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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 587.

MINNESOTA STATE LIBRARY

THE MUTUAL FILM CORPORATION OF MISSOURI, APPELLANT,

vs.

GEORGE H. HODGES, GOVERNOR; CHARLES H. SESSIONS, SECRETARY OF STATE; JOHN S. DAWSON, ATTORNEY GENERAL, AND W. D. ROSS, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF KANSAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED AUGUST 11, 1914.

(24,341)

(24,341)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 597.

THE MUTUAL FILM CORPORATION OF MISSOURI, APPELLANT,

vs.

GEORGE H. HODGES, GOVERNOR; CHARLES H. SESSIONS, SECRETARY OF STATE; JOHN S. DAWSON, ATTORNEY GENERAL, AND W. D. ROSS, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF KANSAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1914.

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1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to George H. Hodges, Governor; Charles H. Sessions, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction, of the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, District of Columbia, within thirty days from the date of this Writ, pursuant to an appeal duly allowed by the District Court of the United States, for the First Division of the District of Kansas, on July 3rd, 1914, in the case where the Mutual Film Corporation of Missouri is Appellant, and you are the Appellee; and show cause if any, why the final decree and orders rendered against the said Appellant, as in the said appeal mentioned should not be reversed and decree entered in accordance with the prayer of the Amended Bill of Complaint, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. John C. Pollock, Judge of the District Court of the United States, for the District of Kansas, First Division, this 3rd day of July, 1914.

JOHN C. POLLOCK,
District Judge.

UNITED STATES OF AMERICA,
District of Kansas, First Division, ss:

Due service of the above citation acknowledged this 3d day of July, 1914.

JOHN S. DAWSON,
Attorney General;
FRANK P. LINDSAY,
Solicitors for Defendants.

[Endorsed:] #11-N. Mutual Film Corporation of Missouri vs. George H. Hodges et al. Citation. Filed July 3, 1914. Morton Albaugh, Clerk.

2 In the District Court of the United States, within and for the District of Kansas, First Division.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,
against
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction, of the State of Kansas, Defendants.

Amended Bill of Complaint.

Complaint in Equity under Section 266 of the Act of March 3, 1911, of the Congress of the United States, Entitled "Injunction Based upon Alleged Unconstitutionality of State Statute; When and by Whom May Be Granted."

To the Honorable Judge of the District Court of the United States for the District of Kansas, First Division, or to the Honorable Justices of the Supreme Court of the United States, or to the Honorable Judge or Judges of the Circuit Court of the United States, or to the District Judge or Judges Thereof:

Your Complainant respectfully shows to the court as follows:

1. That the Complainant is a Civil Corporation, duly organized and existing as such under the laws of the State of Delaware, and authorized and licensed to do business in the State of Missouri.

2. That the Defendants, as herein named, are the respective officers of the State of Kansas, in their respective official positions, as herein indicated, and are citizens of the said State of

3 Kansas.

3. That the Complainant is engaged in local and Interstate commerce, in the renting, leasing and in the sale and delivery of what is called "Films", in the State of Kansas, and other States, which films heretofore, and now are, being used in the Motion-Picture Show Business of the State of Kansas, as well as elsewhere.

4. The nature, character and production of Films is as follows: It may be a Scenario of an original story, or theatrical production, conceived by a writer or author. This is a sketch of a plot, or chief incidents of a libretto or play, a drama, a prose or poetical composition, depicting human life and conduct on a stage. It may be also a reproduction of inanimate objects, scenery, picturesque views, animals, and is descriptive, educational, instructive, as well as amusing.

5. The Scenario, story, or thing produced, is reproduced or printed by photographic impression on a sensitized celluloid film, with the aid of specially prepared lenses, so arranged that the impressions may be taken in rapid succession on a continuous length of such celluloid film, and which is printed thereon by the aid of Nature and lenses, and thereafter, from the result of this, copies are made, produced and printed, which resulting print is called a film, and is distributed for display, with the aid of electrical appara-

tus and mechanical appliances, capable of projecting, at the same time producing on a screen or curtain an enlarged facsimile of said print or film, in such a manner as to cause the illusion of the original to appear to be animated to the eye; being a rapid display of still photographs, showing Nature, Life, and human conduct.

4 6. That there are now, in the State of Kansas, about five hundred (500) Motion Picture Theatres using these films, and depending upon them for the use thereof in their several places of business; that this number of show places in the State of Kansas, rent, lease and procure the films for their business from this Complainant, and others in a similar business in different States of the United States; that each one, and each separate Moving Picture show uses on an average three (3) films per day.

7. That a copy of the Act of the Legislature of the State of Kansas, herein complained of, is attached to this Complaint as Exhibit "A", which will be later hereinafter referred to in this Complaint; the Exhibit "A" being attached to this Complaint for brevity in the drafting hereof, and so referred to as such Exhibit;

8. That under the provisions of said Act, a revenue in the shape of a tax, is herein attempted to be imposed, of Two Dollars ($2.00) upon each film censored under the Act, which means a tax of six dollars ($6.00) per day on the film sold, rented, used or exhibited in each Moving Picture Show in the State of Kansas, and means the approximate sum total of three thousand dollars ($3,000) per day on the films sold, rented, used or exhibited in the entire picture-show business of the State of Kansas, meaning, by the provisions of the Act, a total revenue to be collected from the films sold, rented, used or exhibited in the Picture Show Business of the State of Kansas of approximately the total tax of Forty Thousand Dollars ($40,000.00) for the first three (3) months, in the beginning of the enforcement of the Act; and thereafter, means a revenue of thousands of dollars, to be imposed and taxed upon new films printed and produced and used in the State of Kansas;

5 9. That under the provisions of the Act, it places a tax upon the films rented, hired and shipped into the State of Kansas, upon this Complainant, of the sum of about Three Hundred Dollars ($300.00) per week, for the period of three (3) months, or approximately a total cost, under this Act, of Three Thousand Nine Hundred Dollars ($3,900.00) for the first three (3) months, and about Six Thousand Two Hundred Dollars ($6,200.00) for the first year, to this Complainant; and means thereafter a tax against this Complainant, on its Inter-State Commerce business, of a similar tax, to be imposed upon all new films produced and printed and sent into the State of Kansas by this Complainant, provided the business of this Complainant does not increase, of the sum of about Three Thousand Two Hundred Dollars ($3,200.00) each year.

10. That under the provisions of the Act, it is provided that the duties of censorship of films brought into the State, shall be, and are imposed upon the State Superintendent of Public Instruction, attempting, by the provisions of the Act, to invest power of censorship upon the State Superintendent of Public Instruction, giving

and attempting to vest the exclusive power of original censorship in the State Superintendent of Public Instruction, thereby attempting to place the power of exclusive censorship of all films sent into the State upon the State Superintendent of Public Instruction, and thereby giving and granting to such Superintendent the power to censor, review, or stamp with his sole approval, for use in the State, all films used, shipped, rented, or sent into the State;

11. That under the provisions of the Act complained of, it fixes, as stated above, a fee of two dollars ($2.00) for each moving-
6 picture film or reel censored by such State Superintendent of Public Instruction, and further provides that no picture film or reel shall be examined until such fee shall have been paid to him; and further provides that all such fees for such censorship, paid to the State Superintendent of Public Instruction shall be paid by him into the State Treasury of the State of Kansas, and by said State Treasurer credited to the General Revenue Funds of the State.

12. The said Act complained of further provides that the said State Superintendent of Public Instruction shall have general power and authority to supervise and regulate the display of all moving-picture films or reels in all places of amusement, or elsewhere, within the State of Kansas; said power and authority shall include the power to inquire into and investigate, and to have displayed for his benefit, to aid him in his investigation, the moving-picture films or reels which are intended to be displayed; and said State Superintendent of Public Instruction shall approve such moving-picture films or reels as shall, in his opinion, be moral and proper, and disapprove such moving-picture films or reels as, in his opinion, as such censor, shall be improper.

13. The said Act further provides that it shall be the duty of every person, firm or corporation intending to sell, rent, or exhibit any moving-picture film or reel within the State of Kansas, to furnish to said State Superintendent of Public Instruction, as he may require, a description of said moving-picture film or reel, describing the scenes and purpose of that film or reel, and to exhibit and display for his examination and approval, or disapproval, any such film or reel.

7 14. The said Act further provides that any person, firm, or corporation exhibiting or permitting to be exhibited any unapproved and uncensored moving-picture film or reel, shall be guilty of a misdemeanor, and shall be fined not less than twenty-five dollars ($25.00) for the first offense, and not less than one hundred dollars ($100.00) for each subsequent offense; each unapproved moving-picture film or reel exhibited, and each day the same shall be exhibited, shall constitute a separate offense.

15. That this Act complained of was to take effect on the first day of April, 1913.

16. That by reason of the nature of the motion-picture business and of the methods by which it is necessarily conducted between Complainant and its customers in the State of Kansas and by other film exchanges and their customers in said State, complainant and

other film exchanges must necessarily bear the expense of censorship and approval of films, otherwise the amount of the charges therefor would necessarily be doubled or trebled.

17. Your Complainant represents to the Honorable Judges of the United States Court, and states that said Act of the Kansas Legislature, herein complained of, is unconstitutional, and alleges that it is so unconstitutional for the following reasons:

18. First: That said Act is in conflict — and in violation of Section 10, Article 1 of the Constitution of the United States, in this: That, as is so provided by the Constitution of the United States under said Section 10, Article 1, no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its Inspection Laws,

8 and the net product of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States.

19. The Complainant alleges that under this Section of the Constitution, said Act is in violation thereof, in the fact that the Act provides that the tax to be imposed by the State upon the import of films shall be paid into the Treasury of the State of Kansas, and by said Treasurer credited to the General Revenue Fund of the State, making no provision, even if the power existed to censor such films, for the actual expense of inspection, if such could be so done, and making no provision for the residue of such tax and the revenue therefrom to be paid into the Treasury of the United States, as is so provided by the Constitution.

20. Second: Your Complainant further alleges that said Act is in violation of the Amendment to the Constitution of the United States, to-wit, The Fourteenth Amendment, more particularly, Section 1, of Article 14, in this: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. This Act complained of, is in violation of this provision of the Constitution, in that it abridges the privileges and immunities of citizens of other States, in placing an embargo and prohibition on the rights of citizens of other States, in transacting legal and lawful business with the citizens in the State of Kansas. The provisions of the Act in this respect places an embargo upon the business of this Complainant, and others in a similar business, in that the Act itself is prohibitive of its own intention, expressed therein, in the fact that no appropriation by the Legislature of the

9 State of Kansas was had or made to defray the expenses of such inspection; in that, further, no provision in the Act is made that any expenses whatever shall be paid for such inspection out of this fund, which the Act declares shall be the General Revenue Fund of the State: In effect, by reason thereof, to place an embargo on the business of the Complainant and others, making it prohibitive against this Complainant and others, even if the Act were otherwise effective, from securing and obtaining a prompt, efficient censorship or inspection, so that the business itself can be continued within the State, while, at the same time, the Act provides a criminal punishment upon the people of the State,

and out of the State, against the infringement of the Act, when it is not made possible to comply with the Act, for reasons above stated.

21. Your complainant further shows that because of this prohibitive situation in the Act, and by reason of this condition and prohibitive element of the Act, the State Superintendent of Public Instruction and the Attorney General of the State of Kansas, caused to be published in The Topeka State Journal, of date March 31, 1913, the following advertisement:

"Competent and public spirited men or women to inspect moving pictures. Applicants must be willing to trust to 1915 Legislature for their pay. No funds available before that date. Send references with application to W. D. Ross, State Superintendent of Public Instruction, State House, Topeka, Kansas."

22. Your Complainant further alleges and represents that said Act is in violation of the Bill of Rights of the Constitution of the United States, and also of the State of Kansas, in that it abridges the freedom of speech and of the press, and further, violative of the Bill of Rights of the Constitution of the United States, in that no person shall be deprived of life, liberty, or property, without
10 due process of law. It is in violation, and it is an abridgement of the right of free speech, and of the press, in the fact that the Act is one of pure censorship. Censorship in America died with the birth of the Constitution of the United States; and under the provision of the Constitution, in the Bill of Rights, censorship is not only barred by the provision, but is obnoxious to a free people, in that, under the Bill of Rights, no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will, on any subject, being only responsible for all abuse of that liberty.

23. The evident intention of the Bill of Rights, thus expressed, is penalty or punishment, and not prevention, because, if prevention exists, then no opportunity can possibly arise for any one becoming responsible for saying, writing or publishing whatever he will, on any subject. The two ideas—the one of absolute freedom to say, write or publish whatever he will, on any subject, coupled with responsibility therefor, and the other idea of preventing any such free speech, free writing, or free publication, can not exist. The Bill of Rights, and the Constitution simply forbids any law to be passed impairing the freedom of speech, and then give a general perpetual guaranty against any interference from any quarter whatever, with the freedom of every person to say, write or publish whatever he will, on any subject. So that whatever speech is uttered, writing done, or publication made, in any manner, shape or form, there stands the Constitutional Guaranty giving staunch assurance that each and every one of them shall be free.

11 24. It has been declared that everything in the Declaration of Rights contained is excepted out of the general powers of Government, and all laws contrary thereto shall be void. The rights thus designated in Section 14 of the Constitution, are excepted out of the General Powers of the Government, and all laws contrary thereto are void, and so long as such provisions of the Bill

of Rights continue in force, they remain absolute and unchangeable rules or acts and decisions.

25. The provisions of such Bill of Rights means that the security of individual rights can not be too frequently declared, nor in too many forms of words, nor is it possible to guard too vigilantly against the encroachments of power, nor to watch with too lively a suspicion the propensities of persons to break through the cob-web chains of paper constitutions.

26. Censorship, as attempted in the Act, and the wrong therein, or attempted thereby, is a strong attempt "To break through the cob-web chains of paper Constitutions", in that free speech is an inevitable concomitant and adjuvant of personal liberty, as necessary to the latter's existence, as vital air to the lungs, or locomotion to the body. The rights thus conferred under the Bill of Rights, guarantee to the people of the United States even something more than the mere privilege of locomotion. The guaranty is the negation of arbitrary power in every form, which results in the deprivation of right.

27. These terms, "Life, Liberty and Property" are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, re-
12 ligious and political freedom, exemption from arbitrary arrests,the right to buy and sell,as other- may—all our liberties, personal, civil and political—in short, all that makes life worth living; and of none of these liberties can anyone be deprived, except by due process of law.

28. The Bill of Rights, as defined by the Constitution, makes, no distinction, and authorizes no difference to be made by Courts or Legislatures between a proceeding set on foot to enjoin the publication of any sort or nature, however injurious it may be, or to prohibit the use of free speech or free writing on any subject whatever, because wherever censorship or injunction begins, there the right of free speech, free writing, or free publication ends. No halfway house stands on the highway between absolute prevention and absolute freedom.

29. The rights established by Section 14, can neither be impaired by the Legislature, nor hampered nor denied by the Courts. The Act in question is in violation of the Bill of Rights, because the freedom of speech, printing and publication are granted, only being responsible " the abuse thereof.

30. This Act, complained of, is in violation of the Bill of Rights, because it condemns the right of free speech and free publication before trial, and violates that provision of the Constitution that no person shall be deprived of Life, Liberty and the pursuit of happiness without due process of law.

31. This Act is violative of that provision, first, as to the right of free speech of the press; next, that it deprives a citizen of the right of Liberty and Property, without due process of law. It condemns before trial; it condemns before it is determined judicially
13 that the thing censored is an abuse of the right of free speech and free press. It is not due process of law, for the reason

that a judicial power is attempted to be invested in the State Superintendent of Public Instruction, who is not a part of the Judiciary of the State of Kansas, and, by his opinion, to censor and condemn the rights of property in others, without trial and without a judicial inquiry as to whether or not the matter censored is in violation of any abuse of the right of free speech and free publication.

32. The language of the Constitution, "only being liable for an abuse of free speech and free press," means that only the abuse is a matter of judicial investigation, and until a matter or thing is adjudged to be an abuse of free speech and liberty of person and property, it is not an abuse until so judicially determined.

33. The Act complained of is further in violation of the Constitution of the United States, in that it is a tax upon Inter-State Commerce, and the Commerce between citizens of different States.

34. The Complainant alleges that the business, the making, printing, and publication of films in the manner described in this complaint, while true it is a new invention and discovery of Science, the uses of Nature and electricity, yet, at the same time, in the manner in which it is conducted, as herein described, it is nevertheless the advancement of publication, printing, speaking, and acting, and the portrayal of Nature, scenery, human conduct, and is instructive, educational, while, at the same time, amusing.

35. Your complainant further says and alleges that the Attorney General of the State of Kansas is now attempting to enforce
14 the provisions of said Act, and, under the provisions of said Act, by the Attorney General of the State of Kansas, arrests have been made by informations filed in the District Court of Shawnee County, in the State of Kansas, and Warrants have been issued under such informations.

36. For convenience, and as a part of this Complaint, a certified copy, or certified copies of such information and warrant are to this Complaint attached, and marked Exhibits "B" and "C";

37. That the Attorney General of the State of Kansas now threatens and intends to enforce the provisions of such Act, by making arrests of all persons using and exhibiting moving-picture films or reels in the State of Kansas; and the Attorney General will, unless restrained by the Honorable Judges of this court, institute criminal proceedings against all persons using or exhibiting such reels or films.

38. The complainant alleges that the Attorney General, Mr. Dawson, of the State of Kansas, in the issue of the Topeka Daily State Journal, of Friday, April 4th, 1913, caused said paper to state that, "Before leaving for Kansas City last night, Attorney General, John S. Dawson, stated that he had entered into no stipulation with the movie people which permitted them to display uncensored films before the constitutionality of the law is settled, and that he would consider all displays of uncensored pictures a violation of the law. The new censorship law provides a fine of not less than $25.00 nor more than $100.00 per day for the displaying of uncensored films".

39. Your Complainant further alleges that the Attorney General

of the State of Kansas, unless restrained by this Honorable
15 Court, will cause a multiplicity of suits to be instituted in the State of Kansas, under this act, and therefore, your complainant pleads that a Court of Equity should, as well as the Act of March 3, 1911, so provides, exercise its restraining power, through the Honorable Judges of this Court, to restrain prosecutions, and to restrain the enforcement of the provisions of the Kansas Act complained of, until the hearing under this Complaint for an Interlocutory injunction; and for the further reason that the enforcement of the Act, if unconstitutional, will result in great damage and irreparable loss to this Complainant in its business, and to others in similar business.

40. Wherefore, your Complainant prays that a restraining Order by the Honorable Judges of this Court may be at once issued, restraining the State officers of the State of Kansas from the enforcement of the provisions of said Act of Censorship, as herein pleaded, until a hearing upon this Petition for an Interlocutory Injunction may be had.

41. Your Complainant further prays that the Honorable Judges of this Court will issue an Interlocutory Injunction against the officers of the State of Kansas, enjoining them from the enforcement of the provisions of said Act; that said Act be adjudged unconstitutional, as your Complainant verily believes it is, and, being unconstitutional, that the Honorable Judges of this Court will peremptorily enjoin and prohibit the officers of the State of Kansas, these defendants, from enforcing the provisions of said Act, as your Complainant will ever pray.

WALTER N. SELIGSBERG,
THOS. F. GATTS,
EUGENE BATAVIA,
Solicitors for Complainant.

16 STATE OF MISSOURI,
County of Jackson, ss:

Patrick J. Hall, Local Business Manager of the Complainant herein, makes oath and says, that the allegations of the above Bill are true, to the best of his knowledge, information and belief, and that the exhibits hereto attached are true copies of the original exhibits attached to and made part of the original complaint in equity.

Affiant says that with respect to the citizenship of the parties to the Bill, he is acquainted therewith, and the allegations in that behalf are true.

PATRICK J. HALL.

Sworn to and subscribed before me, on this 14th day of May, A. D. 1913.

[NOTARIAL SEAL.] CHARLES H. WOLF,
Notary Public Within and for the County of Jackson, State of Missouri.

My commission expires January 5, 1916.

17 Senate Bill No. 367.

An Act regulating the exhibiting or using of moving-picture films or reels; providing and regulating the examination and approval of moving-picture films and reels, and fixing penalties for the violation of this act, and making an appropriation for clerical help to carry this act into effect.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That on and after April 1st, 1913, it shall be unlawful for any person, firm or corporation to exhibit or use any moving-picture film or reel unless the said film or reel shall have been examined and approved by the state superintendent of public instruction, as hereinafter provided for; provided, that nothing in this act shall apply to moving picture films or reels used exclusively in institutions of learning in Kansas.

SEC. 2. In addition to the duties now imposed upon the state superintendent of public instruction, it shall be his duty to examine all moving picture films or reels intended for exhibition in this state, and approve such as he shall find to be moral and instructive, and to withhold his approval from such as tend to debase or corrupt the morals. Upon such moving picture films or reels examined by him, and which shall be approved by him, there shall be stamped or written a certificate signed by him showing that such picture has been examined and approved by him, giving the date of such approval.

SEC. 3. The said superintendent of public instruction shall keep an accurate record of all examinations made by him and the date thereof, and by whom presented for examination, and noting such pictures as shall be approved and such as shall not have been approved, and briefly stating his reasons for withholding his approval of such as are not approved.

SEC. 4. For each examination made by said officer he shall receive the sum of two dollars for each moving picture film or reel. No picture film or reel shall be examined until such fee shall have been paid to him, and all such fees shall be paid by him on the last day of each quarter to the state treasurer, and by said state treasurer credited to the general revenue fund; provided, that the treasurer shall issue receipts for such fees in triplicate, one to the state auditor, one to the state superintendent and one to be kept by him and filed in his office. Provided, that for good and sufficient reasons shown, the governor may authorize the employment by the superintendent of public instruction, one or more additional clerks in his office as may be necessary, at a per diem not to exceed three dollars per day for each day actually employed, which per diem shall be paid out of the general revenue fund on warrants duly issued and payable in the same manner as other clerks in said office are paid.

18 SEC. 5. That the said state superintendent of public instruction shall have general power and authority to supervise and regulate the display of all moving picture films or reels in all places of amusement or elsewhere within this state. Said power and authority shall include the power to inquire into and investi-

gate, and to have displayed for his benefit, to aid him in his investigation, the moving picture films or reels which are intended to be displayed, and said state superintendent of public instruction shall approve such moving-picture films or reels as shall be moral and proper, and disapprove such moving-picture films or reels as are sacrilegious, obscene, indecent or immoral, or such as tend to corrupt the morals; provided, however, in the case he should disapprove of any moving-picture film or reel, the person, firm or corporation offering the same for examination may have the same examined by a commission consisting of the governor, attorney general and secretary of state, who shall examine said reel or film, and if they, or a majority of them shall find the same is fit for exhibition, on their order the said superintendent of public instruction shall endorse his approval thereon.

SEC. 6. It shall be the duty of every person, firm or corporation intending to sell, rent or exhibit any moving-picture film or reel within this state, to furnish to said superintendent of public instruction, as he may require, a description of said moving-picture film or reel, describing the scenes and purposes of any film or reel, and to exhibit and display for his examination and approval or disapproval any such film or reel.

SEC. 7. Any person, firm or corporation exhibiting or permitting to be exhibited any unapproved moving-picture film or reel shall be guilty of a misdemeanor, and shall be fined not less than twenty five dollars nor more than one hundred dollars for the first offense and not less than one hundred dollars for each subsequent offense. Each unapproved moving-picture film or reel exhibited, and each day the same shall be exhibited, shall constitute a separate offense.

SEC. 8. All laws and parts of laws so far as they conflict herewith are hereby repealed.

SEC. 9. This act shall take effect and be in force on and after the first day of April, 1913, and its publication in the official state paper.

19 In the District Court of Shawnee County, Kansas.

No. 6314.

THE STATE OF KANSAS, Plaintiff,
vs.
LEW NATHANSON, Defendant.

Information.

Count One.

I, John S. Dawson, Attorney General of the State of Kansas, in the name, by authority, and on behalf of the State of Kansas, come now here and give the court to understand and be informed that in Shawnee County, State of Kansas, on the second day of April, 1913, A. D., in a certain theater, commonly known and designated

as "The Best," located at and about street numbers 400 and 402, Kansas Avenue, City of Topeka, in aforesaid County and State, one Lew Nathanson, then and there being, and he the said Lew Nathanson being then and there the manager of said theater, did then and there unlawfully and wilfully exhibit certain divers and sundry moving pictures to large numbers of men, women, and children, which persons were then and there present in said theater as paying patrons thereof, without him the said Lew Nathanson having first submitted said moving pictures or the films or descriptions thereof to the State Superintendent of Public Instruction for inspection and approval and without him the said Lew Nathanson having tendered or paid the lawful fee for such inspection and approval and without the said moving pictures or the films or descriptions thereof having been approved by the State Superintendent of Public Instruction, all of which in the manner and form and at the time aforesaid, the said Lew Nathanson unlawfully, wilfully, then and there did, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Kansas.

JOHN S. DAWSON,
Attorney General.

STATE OF KANSAS,
Shawnee County, ss:

John S. Dawson, of lawful age upon his oath duly administered deposes and says:

My name is John S. Dawson. I am the duly elected, qualified and acting Attorney General of the State of Kansas. I have read the foregoing information, know its contents and solemnly swear that each and every allegation therein contained is true. So help me God.

JOHN S. DAWSON.

Subscribed in my presence and sworn to before me this 2nd day of April, A. D. 1913.

[SEAL.]

H. L. ARMSTRONG,
Deputy Clerk, Sup. Ct.

Filed Apr. 2, 1913. C. W. Bower, Clerk District Court.

Copy.

21 In the District Court of Shawnee County, Kansas.

No. 6314.

THE STATE OF KANSAS, Plaintiff,
vs.
LEW NATHANSON, Defendant.

Warrant.

The State of Kansas to the Sheriff of the County of Shawnee Greeting:

Whereas, Information in writing under oath has been made and filed in the District Court of Shawnee County, State of Kansas, charging that in Shawnee County, State of Kansas, on the second day of April, 1913, A. D., in a certain theater, commonly known and designated as "The Best," located at and about street numbers 400 and 402 Kansas Avenue, City of Topeka, in aforesaid, County and State, one Lew Nathanson, then and there being, and he the said Lew Nathanson being then and there the manager of said theater, did then and there unlawfully and wilfully exhibit certain divers and sundry moving pictures to large numbers of men, women and children, which persons were then and there present in said theater as paying patrons thereof, without him the said Lew Nathanson having first submitted said moving pictures or the films or descriptions thereof to the State Superintendent of Public Instruction for inspection and approval and without him the said Lew Nathanson having tendered or paid the lawful fee for such inspection and approval and without the said moving pictures or the films or descriptions thereof having been approved by the State Superintendent
22 of Public Instruction, all of which in the manner and form and at the time aforesaid, the said Lew Nathanson unlawfully, wilfully, then and there did, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Kansas.

You are, therefore, hereby commanded to forthwith arrest said Lew Nathanson and bring him before one of the Judges of the District Court of Shawnee County, Kansas, or in their absence, the Clerk of said Court, to be admitted to bail in such sum as may be lawfully fixed, for his appearance at the District Court of said County to answer The State of Kansas on said charge for said offense; and make due return of this writ.

Witness my hand at my office in Shawnee County and State aforesaid, this 2 day of April, 1913.

[SEAL.]

C. W. BOWER,
Clerk of the District Court.

Bail fixed at $—.

Copy.

Indorsed: In Equity No. 11-N. In the District Court of the United States, within and for the District of Kansas, First Division. Mutual Film Corporation of Missouri, Complainant vs. George H. Hodges, Governor, Charles H. Sessions, Secretary of State, John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants. Amended Bill of Complaint. Filed May 26, 1913, as of May 14, 1913. Morton Albaugh, Clerk. Eugene Batavia, Thos. F. Gatts, Walter N. Seligsberg, Solicitors for Complainant.

23 In the District Court of the United States within and for the District of Kansas, First Division.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN S. DAWSON, Attorney General, and W. D. ROSS, State Superintendent of Public Instruction of the State of Kansas, Defendants.

Amended Answer of the Defendants.

To the Honorable Judges of the District Court of the United States aforesaid:

The defendants, George H. Hodges, Governor, Charles H. Sessions, Secretary of State, John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction, reserving all and all manner of exceptions that can or may be had or taken to the many uncertainties and imperfections of the amended bill come now and answer thereto, or to so much thereof as they are advised is material to be answered, and say:

1. Defendants admit the corporate capacity of complainant as is alleged in paragraphs No. 1 of complainant's amended bill.

2. Defendants admit these defendants are officers of the State of Kansas as designated by complainant in paragraph No. 2 of the amended bill.

3. Defendants admit that complainant is engaged in local and interstate commerce, in the renting, leasing and in the sale and delivery of what it calls films in the State of Kansas, and admit
24 the nature, character and production of the films and scenario thereof as described in paragraphs numbered 3, 4, and 5 of the amended bill.

4. Defendants admit that there are now in the State of Kansas about five hundred motion picture theaters using these films, and depending upon them for the use thereof in their several places of business; that this number of show places in the State of Kansas rent, lease and procure the films for their business from this complainant, and others in a similar business in different states of the United States; that each one, and each separate moving picture show uses on an average three films per day as alleged in paragraph number 6 of the amended bill.

5. Defendants admit the accuracy of the act of the Legislature of the State of Kansas as complained of as attached to the amended bill of complaint marked Exhibit "A" and as alleged in paragraph number 7 of the amended bill.

6. Defendants deny that under the provisions of said act a revenue in the shape of a tax is therein attempted to be imposed of Two Dollars upon each film censored under the act, and deny that the said act thereby means to impose a tax of Six Dollars per day on the films sold, rented, used or exhibited in each moving picture show in the State of Kansas, and deny that said act means an approximate sum total of Three Thousand Dollars per day on the films, sold, rented, used or exhibited in the entire picture show business of the State of Kansas, and deny that the true meaning thereof, by the provisions of said act, is a total revenue to be collected from the picture show business of the State of Kansas of approxi-
25 mately the total tax of Forty Thousand Dollars for the first four months, in the beginning of the enforcement of the act; and deny that thereafter such act means a revenue of thousands of dollars, to be imposed upon the new films printed and produced and used within the State of Kansas, as alleged in paragraph number 8 of the amended bill.

7. Defendants deny that under the provisions of the act it places a tax upon the films rented, hired and shipped into the State of Kansas, upon this complainant, of the sum of Three Hundred Dollars per week for the period of three months, or approximately a total cost, under this act, of Three Thousand Nine Hundred Dollars for the first three months, to this complainant; and defendants deny that it means thereafter a tax against this complainant, on its interstate commerce business, of a similar tax, to be imposed upon all new films produced and printed and sent into the State of Kansas by this complainant, as alleged in paragraph 9 of the amended bill.

8. Defendants admit that under the provisions of the act it is provided that the duties of censorship of films brought into the State shall be and are imposed upon the State Superintendent of Public Instruction, attempting by the provisions of the act to invest power of censorship upon the State Superintendent of Public Instruction, but deny that the act thereby attempts to vest the exclusive power of original censorship in the State superintendent of Public Instruction, but admit that the act gives and grants to such Superintendent the power to censor, review, or stamp with his approval, but not his sole approval, for the use of the State, all films
26 used, shipped, rented, or sent into the State, as alleged in paragraph number 10 of the amended bill.

9. Defendants admit that under the provisions of the act complained of, it fixes, as stated above, a fee of Two Dollars for each moving picture film or reel censored by such State Superintendent of Public Instruction, and further provides that no picture film or reel shall be examined until such fee shall have been paid to him; and further provides that all such fees for such censorship paid to the State Superintendent of Public Instruction shall be paid by him to the State Treasurer of the State of Kansas, and by such State Treasurer

credited to the general revenue fund of the State of Kansas, as set forth in paragraph number 11 of the amended bill.

10. The defendants deny that the said act complained of further provides that the said State Superintendent of Public Instruction shall have general power and authority to supervise and regulate the display of all moving picture films or reels in all places of amusement, or elsewhere, within the State of Kansas, but defendants admit that said power and authority shall include the power to inquire into and investigate, and to have displayed for his benefit, to aid him in his investigations, the moving picture films or reels which are intended to be displayed; and admit that said State Superintendent of Public Instruction shall approve such moving picture films or reels as shall, in his opinion, be moral and proper, and disapprove such moving picture films or reels, as, in his opinion, as such censor, shall be improper, as alleged in paragraph number 12 of the amended bill.

11 Defendants admit that the said act further provides that it shall be the duty of every person, firm or corporation intending to sell, rent, or exhibit any moving picture film or reel within the State of Kansas, to furnish to said State Superintendent of
27 Public Instruction as he may require, a description of said moving picture film or reel, describing the scenes and purpose of that film or reel, and to exhibit and display for his examination and approval, or disapproval, any such film or reel, as alleged in paragraph number 13 of the amended bill.

12. Defendants admit that the said act further provides that any persons, firm or corporation exhibiting or permitting to be exhibited any unapproved and uncensored moving picture film or reel, shall be guilty of a misdemeanor and shall be fined not less than Twenty-five dollars for the first offense, and not more than One Hundred Dollars for each separate offense; each unapproved moving picture film or reel exhibited, and each day the same shall be exhibited, shall constitute a separate offense, as alleged in paragraph 14 of the amended bill.

13. Defendants admit that the act complained of was to take effect and did take effect on April 1st, A. D. 1913, as alleged in paragraph 15 of the amended bill.

14. Defendants deny that by reason of the nature of the motion picture business and of the methods by which it is necessarily conducted between complainant and its customers in the State of Kansas and by other film exchanges and their customers in said State, complainant and other film exchanges must necessarily bear the expense of censorship and approval of films, otherwise the amount of the charges therefor would necessarily be doubled or trebled, as alleged in paragraph number 16 of the amended bill; but defendants admit that it would make for expedition, simplification and convenience in the administration of the law in controversy if
28 the complainant and the other film companies similarly situated and interested in the Kansas moving picture film trade would submit their films for inspection and pay the fees therefor before distributing their films to the theater managers throughout

the State, recouping themselves for the inspection fees thus paid by adding a cent or two to the rental charge for each film.

15. Defendants deny that the said act of the Kansas Legislature, herein complained of, is unconstitutional for any reason or reasons set forth in the amended bill of complaint, or for any other reason whatsoever, as alleged in paragraphs numbered 17, 18, 19 and 20 of the amended bill.

16. Defendants deny that the State Superintendent of Public Instruction and the Attorney General of the State of Kansas caused to be placed in the Topeka State Journal on the date of March 31, 1913, the following advertisement as set out in paragraph number 21 of complainant's amended bill.

"Competent and public-spirited men or women to inspect moving pictures. Applicants must be willing to trust to 1915 Legislature for their pay. No funds available before that date. Send references with application to W. D. Ross, State Superintendent of Public Instruction, State House, Topeka, Kansas."

And defendants deny that they ever authorized any such advertisement, and defendants believe, and therefore allege, that that pretended advertisement was merely the work of a clever and jocular newspaper reporter in attempting to bring before the public in a humorous way some alleged imperfections of detail in the legislative draftsmanship of the act of the Legislature in controversy, as alleged in paragraph number 21 of the amended bill.

17. Defendants deny that the act in question is in violation of any of the provisions of the Constitution of the United States,
29 or of the State of Kansas, or in contravention of any rights secured to the complainant herein as alleged and set forth in paragraphs numbered 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 of complainant's amended bill.

18. Defendants admit that the business, the making, printing, and publication of films in the manner described in complainant's amended bill, while true it is a new invention and discovery of science, the use of nature and electricity, yet, at the same time, in the manner in which it is conducted, as in said amended bill described, it is nevertheless the advancement of publication, printing, speaking, and acting, and the portrayal of nature, scenery, human conduct, and is instructive, educational, while, at the same time, amusing, as set forth in paragraph 34 of the amended bill.

19. Defendants admit that the Attorney General of the State of Kansas was, at the time of the filing of this bill, attempting to enforce the provisions of said act, and that under the provisions of said act by the Attorney General of the State of Kansas, an arrest has been made upon information filed in the District Court of Shawnee County in the State of Kansas and that a warrant has been issued under such information and that the Exhibits "B" and "C" attached to complainant's amended bill are true copies of such information and warrant, as set forth in paragraphs numbered 35 and 36 of the amended bill.

20. Defendants admit that the Attorney General of the State of Kansas, but without threat, intends to enforce the provisions of such

act, and that either upon his own initiative, or through prosecutions instituted by the County Attorneys of the several
30 counties of the State of Kansas, he will cause the arrest of all persons using or exhibiting moving picture films or reels in the State of Kansas in violation of the act in controversy, and that the Attorney General will, unless restrained by the Honorable Judges of this Court, or other competent judicial authority, institute criminal proceedings or cause such proceedings to be instituted against all persons using or exhibiting such reels or films, as alleged in paragraph number 37 of the amended bill.

21. Defendants deny the allegation that the Attorney General, Mr. Dawson, of the State of Kansas, in the issue of the Topeka Daily State Journal, of Friday, April 4th, 1913, caused said paper to state that, "before leaving for Kansas City last night, Attorney General, John S. Dawson, stated that he had entered into no stipulation with the movie people which permitted them to display uncensored films before the constitutionality of the law is settled, and that he would consider all dislays of uncensored pictures a violation of the law. The new censorship law provides a fine of not less than $25.00 nor more than $100.00 per day for the displaying of uncensored films." But the defendants do not deny that the Attorney General was quoted by said paper with substantial correctness, as alleged in paragraph number 38 of the amended bill.

22. Defendants deny that the Attorney General of the State of Kansas, unless restrained by this Honorable Court, will cause a multiplicity of suits to be instituted in the State of Kansas, under this act, so long as the complainant is pursuing with diligence this suit, and that since the filing of this suit no further criminal proceedings or other suits have been brought by the Attorney General; and the defendants allege that the Attorney General does
31 not intend for the present to bring any further proceedings under the said act of the Legislature until the judgment of this honorable Court is obtained on this cause herein provided complainant pursues this suit with due diligence. And therefore defendants deny that a Court of Equity should, as well as the act of March 3, 1911, so provides, exercise its restraining power, through the Honorable Judges of this Court, to restrain prosecutions, and to restrain the enforcement of the provisions of the Kansas act complained of, until the hearing under this complaint for an interlocutory injunction; and for the further reason that the enforcement of the act, if unconstitutional, will result in great damage and irreparable loss to this complainant in its business, and to others in similar business, as alleged in paragraph number 39 of the amended bill.

23. Answering further and on their own behalf these defendants allege that by operative interpretation of said act, these defendants, charged with the enforcement thereof, do hold and have held and will continue to hold that a moving picture film once censored by the State Superintendent of Public Instruction and the fee of Two Dollars paid therefor can be repeatedly exhibited anywhere in Kansas and in any and all moving picture theaters, or elsewhere,

without any further payment of fees, and that when such picture is once censored and the fee paid therefor it is censored for all time within the State of Kansas; and that by operative practice of this complainant, and all others engaged in a similar business, the same moving picture is exhibited or shown an indefinite number of times in the same moving picture theater and then dispatched to another moving picture theater in the same town, or in other towns
32 in the State of Kansas, and that such moving picture film or reel is shipped from point to point and remains in the State of Kansas sometimes for several weeks at a time and after leaving the State to be exhibited in other states is frequently returned to the State of Kansas for exhibition in other and different theaters, and that this use of any such picture film or reel goes on indefinitely until it is worn out.

24. Defendants further answering say that all exhibitors of moving pictures are treated on absolutely equality before the law and that any person, partnership, company or corporation presenting to the State Superintendent of Public Instruction a moving picture film, or an accurate description thereof showing that such film is neither sacrilegious, obscene, indecent, immoral, nor does it tend to corrupt the morals is entitled as a matter of absolute right to the approval of the State Superintendent of Public Instruction upon such picture film, and that upon the payment of the fee therefor he may compel the State Superintendent by mandamus, with adequate damages allowed in his behalf to approve such picture film, and if in the sincere judgment and opinion of the State Superintendent any picture film presented to him is objectionable under the law, the person, partnership, company or corporation desiring the approval of such picture film may appeal to a Commission composed of the Governor, Attorney General and Secretary of State, who will promptly approve every such picture not objectionable under the statute. And for the proper administration of their duty as such Commission they have prepared and heretofore used the following blank so that they may act summarily and with dispatch
33 on any appeal taken by any person from any refusal of the State Superintendent to approve any proper picture:

"STATE OF KANSAS:

Moving Picture Censorship.

In the matter of the appeal of —— —— from the refusal of the State Superintendent to approve the picture film entitled —— this Commission find such picture film to be neither sacrilegious, obscene, indecent, immoral, nor does it tend to corrupt the morals therefore the same is approved.

Dated this — day of ——, 191—.

—— ——
Governor.

—— ——
Attorney General.

—— ——
Secretary of State.

In view of the foregoing and in compliance with the Statute I hereby endorse my approval thereon.

State Superintendent of Public Instruction."

And defendants further allege that no formalities nor technicalities are allowed by such appellate Commission but appeals
34 are cared for in the most informal and summary manner and without annoyance, vexation, delay or expense.

25. Answering further these defendants allege that the said bill is not primarily a revenue measure for the State of Kansas but is a good faith exercise of its police power for the protection of the public morals; that the moving picture theaters of the State of Kansas are largely patronized by the children of the State of Kansas with minds unformed and that the development of the moving picture theater business in the State of Kansas, although of recent origin, has made, in the unimpeachable judgment of the Legislature, the necessity for the act in controversy.

26. Defendants answering further say that the State of Kansas expends many millions of dollars each year for the proper education of its children and to nurture them into proper, wholesome and moral citizenship and that out of the general revenue fund of the State of Kansas, by direct appropriations, are expended over two millions of dollars per annum in behalf of such education besides untold millions which are contributed by the various counties, cities and other subdivisions of the State in behalf of education and moral training in citizenship. And that in addition thereto, large but indefinite amounts are expended by private, religious and moral associations and organizations, all seeking the same general end—education and moral training for the young citizenship of the State of Kansas. And the Legislature, in its unimpeachable wisdom, believed that uncen-ored pictures were detrimental to the morals and perversive of true education.

35 27. Answering further defendants say that at this time neither the complainant nor the defendants have any definite figures as to what the actual cost of censorship under the act in controversy may be, but defendants believe, and therefore allege, that when said act becomes in full force and operation that an extensive and expensive system of inspection will be necessary for the proper administration of said act and to see that no uncensored pictures are exhibited in violation of the act, and if there shall be any balance of such inspection fees authorized by this act left over in the State Treasury of the State of Kansas after all expenses of administrative inspection are paid, the State of Kansas will be ready to respond to the National government for any accounting thereon which may be lawfully due the Treasury of the United States under this act and the Constitution of the United States.

28. Answering still further defendants allege that this complainant has no interest in the act of the Kansas Legislature complained of nor does the complainant exhibit pictures to the people of Kansas

in moving picture shows, or elsewhere, nor does the complainant come directly under the provisions of said act, nor can the complainant, as a Delaware corporation licensed to do business in the State of Missouri, transact interstate business within the State of Kansas either with or without the payment of an inspection fee under the act complained of, nor is the complainant liable to any criminal prosecution under the act complained of, but only the persons, firms, partnerships, companies and corporations which actually do exhibit pictures uncensored within the State of Kansas in violation of the act.

29. And defendants further allege that upon its own showing this complainant has brought only mere moot questions into this Honorable Court.

30. Defendants deny that complainant is entitled to any relief whatsoever or any part of the relief in said amended bill of complaint demanded, and allege that complainant has no standing in this Court, or any other court of equity.

31. And defendants pray in all things the same benefit and advantage of this their answer as if they had pleaded or demurred to said amended bill of complaint.

32. And these defendants deny all and all manner of unlawful acts whatsoever whereof they are in any wise by the said amended bill of complaint charged; all of which matters and things these defendants are ready and willing to prove as this Honorable Court shall direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

GEORGE H. HODGES, *Governor;*
CHARLES H. SESSIONS,
Sec'y of State;
JOHN S. DAWSON,
Att'y Gen'l;
W. D. ROSS,
State Sup't,
Defendants.

By JOHN S. DAWSON,
Attorney General, Solicitor for Defendants.

Defendant's Oath to Answer.

STATE OF KANSAS,
Shawnee County ss:

John S. Dawson, being duly sworn deposes and says:

I am one of the above-named defendants. So much of the foregoing answer as concerns my own acts and deeds is true, to the best of my knowledge; and so much thereof as concerns the acts or deeds of my co-defendants, I believe to be true.

JOHN S. DAWSON.

Subscribed in my presence and sworn to before me this 10th day of June, A. D. 1913.

[NOTARIAL SEAL.]

M. E. VOORHEES,
Notary Public.

My commission expires September 28th, 1914.

Indorsed: In the United States District Court, for the District of Kansas, First Division. Mutual Film Corporation of Missouri, Complainant, vs. George H. Hodges, Governor, et al., Defendants. Amended answer of defendants. Filed June 10, 1913, as of May 14, 1913, Morton Albaugh, Clerk. John S. Dawson, Attorney General, Attorney for defendants.

38 In the District Court of the United States Within and for the District of Kansas, First Division.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,
vs.
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants.

STATE OF MISSOURI,
County of Jackson, ss:

Lew S. Nathanson, of lawful age, being first duly sworn upon his oath states:

That he is the owner of two moving picture theaters, located in the City of Topeka, County of Shawnee, State of Kansas; that he rents films from the Mutual Film Corporation, to be exhibited in his said theaters, in Topeka, Kansas; that for each of his said theaters he rents twelve (12) reels of film a week, and that each of said theaters receive- such twelve (12) reels in three (3) installments of four reels each:

That the performances in each of said theaters consist of the exhibition of four (4) reels of film, none of which has ever been exhibited in said theaters prior thereto, except that each set of four (4) reels is exhibited by deponent in each theater for a period of two (2) or three (3) days, at each of about nine (9) performances in each day;

39 That the films received by each of said theatres owned by deponent, are received in three (3) weekly shipments, each consisting of four reels, which come to the deponent by express, and are shipped to the deponent from without the State of Kansas, and carried by an Express Company by railroad to the City of Topeka, where deponent's theatres are located;

That deponent pays as rental for the films for each theatre so owned by him, the sum of Forty-five Dollars ($45.00) per week; that shipments of the films reach deponent's theatres regularly on Mondays, Wednesdays and Fridays of each week;

That the films received at deponent's theatres on Monday are exhibited at the performances in said theatres on Mondays and Tuesdays; that the films received by the deponent on Wednesdays, are exhibited at performances in deponent's theatres on Wednesdays and Thursdays; that films received by deponent on Fridays, are exhibited at deponent's theatres at performances on Fridays and Saturdays;

That the films received by deponent for his theatres on Mondays, are shipped back by him on Tuesday evening, in the same manner as the film is received by him; and that the same is the case with respect to films received on Wednesdays and Fridays, which are shipped back similarly respectively on Thursday and Saturday evenings;

That the various reels of film received by deponent at his theatres are manufactured by different manufacturers, who have offices in various parts of the United States. Some of the reels received by deponent are manufactured by Thanhauser Film Corporation, which manufactures its films in the State of California, and also in the City of New Rochelle, New York; that some of the films received
40 by deponent are manufactured in various other States of the United States, including the States of Illinois, New Jersey and Florida, and that some of the film received by deponent regularly is manufactured in various foreign countries, particularly in France and Italy; and that so far as deponent is informed, and deponent alleges upon information and belief, *that* none of the films received by him and exhibited in his theatres, are manufactured within the State of Kansas; that all of the films received by deponent are shipped by Express, by Parcels Post, or by Freight by the respective manufacturers thereof, from the places of manufacture without the State of Kansas to the point of distribution, also without the State of Kansas, and that it is the custom of manufacturers of films to establish for each reel of film manufactured by them a release day, prior to which date said reel may not be exhibited in any theatre; that the purpose of the establishment of such release date is that the various film exchanges in various parts of the United States may compete with each other freely with respect to reels depicting the same subject, and that no one film exchange may have any advantage over a competitor by renting out a reel prior to said release date;

That the films received by deponent at his two theatres are films from ten to thirty days old, dating their age from their respective release days; that deponent is informed and verily believes that either the same reels of film, or other copies of the same subject, are shown in other moving picture theatres than those of deponent, in other parts of the State of Kansas, both prior to and after the date upon which deponent exhibits the same, or possibly on the same
41 day, they being copies of the original;

That deponent has been in the motion picture exhibiting business for about two and one-half years, and that deponent, prior to his entry into the exhibiting business, frequently attended motion picture shows; that deponent has never seen or witnessed the exhibition of an indecent, immoral, obscene or sacrilegious picture or film, nor has deponent ever exhibited such a film, nor permitted the exhibition thereof, in either of his theatres;

That among the films exhibited in each week by deponent, is a film known as "Mutual Weekly", which consists of motion picture photographs of events of current interest throughout the world. Among such scenes recently exhibited, through the projection of

such MutualWeekly,have been scenes of the recent great floods along the Ohio River; scenes from the Balkan War; That among the scenes appearing upon said Mutual Weekly, which deponent is to receive within the next few days, are the following:

Pictures of the King of Spain visiting the Moorish Buildings in Granada, Spain;

Pictures of three thousand letter carriers in New York City, attending a service at the Catholic Cathedral, in memory of their deceased fellows;

Pictures of the trial flights of a new airship at Washington, D. C.;

Pictures of the funeral of the King of Greece, in Athens;

Pictures of the Zeppelin airship, which, by mistake, landed at Luneville, France;

That among the other films recently exhibited by deponent in his theatres are those depicting the following subjects:

42 A film entitled "The Star of Bethlehem", showing the scene surrounding the birth of Christ;

A film showing with scientific accuracy the life and development of a frog;

A film showing the various uses of electricity, and portraying experiments, demonstrating such uses;

A film showing the course of construction of the largest dam in the world, at Los Angeles, California;

That another picture shows Shakespere's play of Cymbeline" upon the screen, and other pictures shown by deponent at his theatres being dramatizations of "Nicholas Nickleby", and of "Oliver Twist", both by Charles Dickens, and of "The Dove in the Eagle's Nest", by Charlotte M. Yonge;

That it is a frequent occurrence to show by the projection of films dramatizations of famous novels, and of the works of famous authors, either dramatic or literary. The following list contains the names of but a few of the classic works, the action of which has been depicted at deponent's theatres by means of motion pictures:

"The Raven", by Edgar Allan Poe;

"David Copperfield", by Charles Dickens;

"Aurora Floyd", by Charlotte Braeme;

"Pilgrim's Progress", by Bunyan;

"Romeo and Juliet," by Shakespere;

"The Woman in White", by Wilke Collins;

"Jess", by Rider Haggard.

That among other famous literary classics which have been depicted upon films exhibited at my theatre, are the follow-

43 ing: Shakespere's "Merchant of Venice"; Dante's "Inferno"; Homer's "Odyssey"; Elizabeth Barrett Browning's "The Cry of the Children"; Scott's "Guy Mannering"; Charlotte M. Braeme's "Dora Thorne"; Washington Irving's "Rip Van Winkle"; Marie Corelli's "Thelma"; James Sheridan Knowles' "Virginius"; Mrs. Ellen Price Wood's "East Lynn," and La Motte Fouque's "Undine".

That upon each reel of film thrown upon the screen appeared descriptive and explanatory writings, detailing the action in the various

scenes, and where the films show the action in famous stories of dramas, it is customary to have such explanations made by direct quotations from the original, upon the films which are thereupon thrown upon the screen. A particularly famous and popular subject was the subject known as "The Cry of the Children", which followed the action of Elizabeth Barrett Browning's poem of the same name, and which showed in a classic manner, and in beautiful and touching scenes, the evils of child labor.

The moving picture theatre usually charges from five cents to ten cents admission, although some larger and more elaborate theatres charge as much as twenty-five cents. These theatres are patronized to a large extent by people who can not afford to attend the regular theatres at which dramatic presentations are given; and the aim of the proprietors of motion picture theatres and of the manufacturers of films is to portray by the films such dramatic action as is shown in the highest class of dramatic theatres.

That the subjects of motion picture films now exhibited are of such a character that they depict the action, as far as possible, true to life, and portray human emotions, human sentiments,
44 humane and charitable principles, and, for the most part, teach a great principle, and treat of morality, resulting in good impressions upon the human mind. So that the moving pictures, as shown by the films, are in the main descriptive of scenery, art, travel, current history and events, being educational, amusing and instructive. That were the pictures immoral, obscene or wrong, or otherwise than in the way I have described them above, they would be fatal to the business, and would not be patronized by the public generally.

LEW NATHANSON.

Subscribed and sworn to before me this 14th day of May, A. D. 1913.

[NOTARIAL SEAL.] CHARLES H. WOLF,
Notary Public within and for the County of Jackson, State of Missouri.

My commission expires Jan. 5, 1916.

Endorsed: Eq. No. 11-N. In the District Court of the United States, within and for the District of Kansas: First Division. Mutual Film Corporation of Missouri, Complainant, vs. George H. Hodges, Governor, et al., Defendants. Affidavit of Lew S. Nathanson. Filed May 14, 1913. Morton Albaugh, Clerk. Eugene Batavia, Thomas F. Gatts, Walter N. Seligsberg, Solicitors for Comp.

45 In the District Court of the United States within and for the District of Kansas, First Division.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,
vs.
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction, of the State of Kansas, Defendants.

Affidavit of Patrick J. Hall on Behalf of Complainant.

STATE OF MISSOURI,
County of Jackson, ss:

This affiant, Patrick J. Hall, being first duly sworn, on his oath states:

I reside in the City of Kansas City, State of Missouri, and I am the local manager of the Mutual Film Corporation of Missouri, the complainant above named. I have been engaged in the film exchange business for seven years and a half, and I am familiar generally with the motion picture business.

The motion picture business is conducted in three branches, viz: manufacturing, distributing and exhibiting. The manufacturers simply pose and photograph the moving pictures and make positive prints from the negatives and sell them to motion picture film exchanges. Such motion picture films are made in the
46 manner described in the Bill of Complaint herein, which I have read and with the contents of which I am familiar.

The motion picture exhibitor rents films from the film exchange. The reasons why the motion picture exhibitor cannot and does not purchase films are that a reel of film on the average measures one thousand feet in length, and on the average costs $100.00. The public attending motion picture theatres demands that at each performance more than one picture be exhibited. The number of pictures exhibited varies from three to six at a performance in different parts of the United States. The public further demands a change of program at each theatre and such changes are made daily at some theatres, semi-weekly in others and three times a week in others. The cost of procuring films for a theatre, were it necessary for the proprietor thereof to purchase the same, would be so great as to prevent the operation of any theatre, however popular and however large the seating capacity, at a profit. For that reason, almost coincident with the inception of the motion picture business, film exchanges came into existence. These film exchanges purchase a large variety of films from the various manufacturers at a very great expense, and distribute the same at graded rentals among the exhibitors.

The Mutual Film Corporation of Missouri spends each week for the purchase of film alone an average of Two Thousand Six Hundred ($2,600.00) Dollars, and the same is true of many other

film exchanges in other parts of the United States. The said sum of Two Thousand, Six Hundred ($2,600.00) Dollars is the purchase price of about twenty-one new reels of film, which are purchased each week and are an addition to the stock on hand.

47 Motion picture manufacturers all make a practice of producing a certain quantity of film in each week, varying from one to six reels. Each manufacturer sets a day of the week upon which a certain reel manufactured by him may be exhibited and each reel is sold to film exchanges, upon the express agreement that the same will not be rented out for exhibition prior to the day set by the manufacturer. That day is called the "release day." The purpose of establishing release dates for each reel of film is to prevent one film exchange gaining an advantage over other film exchanges by its ability to rent out the reel in advance of a competitor.

The amount of rental paid by an exhibitor to a film exchange depends upon three factors:

First. The quantity of film rented.

Second. The age, dating from the release date of the reel rented.

Third. The frequency of changes of program in each week.

Mutual Film Corporation of Missouri has now on hand, bought and paid for, about one thousand (1,000) reels of film, the cost price of which was about the sum of One Hundred Thousand ($100,000) Dollars, and the value of which at the present time is their cost price less reasonable allowances for wear and tear. Such value is far in excess of the sum of Five Thousand ($5,000) Dollars, and is many times that amount.

Mutual Film Corporation of Missouri conducts its film renting business in various parts of the States of Missouri, Arkansas and Kansas. There are a number of other film exchanges renting out film in a manner similar to complainant in the State of Kansas. Some of the other film exchanges deal in productions in which complainant does not deal, and some of the other film ex-

48 changes, notably film exchanges with offices in Omaha, Nebraska, Oklahoma City, Oklahoma, Denver, Colorado and St. Louis, Missouri, purchase from the manufacturers and rent out to exhibitors in the State of Kansas the same brands of film and reels of film, depicting the same subjects as those dealt in by complainant. Each of said four film exchanges dealing in the same products is, however, operated independently of complainant. In my opinion the only possible method of continuing the rental of film in the State of Kansas, if the proposed censorship law were to go into effect, would be for the film exchanges to procure the approval required by the statute. There are a large number of motion picture exhibitors in the State of Kansas,—about five hundred (500). I do not believe it would be in any wise practicable for the exhibitors themselves to procure the approval of the different films. In the first place, the same subjects are rented from different film exchanges and are shown in different theatres concurrently. No exhibitor would be in a position to know whether the subject had been approved or not, without submitting the same to the Superintendent of Public Instruction. The result would be that in almost

every case each reel of film received by an exhibitor on rental for exhibit would have to be sent to Topeka for approval, because the exhibitor would not, at his peril, exhibit the same.

The film exchange, on the other hand, could with less difficulty than the exhibitor ascertain whether a film had been approved or not, because the film exchange itself handles large quantities of films, and at least as to its own produce could keep track of the approval or non-approval thereof, therefore, making it absolutely necessary for this complainant, or the other film exchanges, to submit before renting out their films to their patrons in
49 Kansas the films for approval.

In the second place, in my opinion, no exhibitor would consent to pay the censoring charge on any particular reel, or reels of film, because he would insist that the film be rented out to some other exhibitor in Kansas before him so that some one else should paw the tax.

In addition to the actual fee for procuring approval, the person procuring approval will necessarily have to pay the express charges to Topeka and back, because all examinations of films, under the statute, would have to be made at Topeka. Under these circumstances it would seem that no film exchange could hope to rent its films to any exhibitor without either first procuring the approval of the film by the Superintendent of Public Instruction direct, or reimbursing the exhibitor for the cost of procuring such approval, because otherwise film exchanges like complainant would be charged with favoring one customer over another, even if they could procure the consent of the customer to pay the charge for approval.

As stated above, each reel of film has a release date. Very often release films are received by film exchanges on release date, and usually but a few days before release date. For rental purposes a reel of film is most valuable during the first ten days after release date, and more particularly on the first day when it has never been shown before, and when the exhibitor showing it can feel assured of its absolute novelty for his patrons. The time lost in the submission of reels for approval, and in the examination and approval thereof, and the return thereof to the film exchange, would in many cases deprive the film exchange of a very substantial part of the rental value of a reel.

50 I submit herewith five copies of a magazine entitled "The Mutual Observer," marked Exhibits "A," "B," "C," "D," and "E," which are marked with my initials and are filed with this affidavit as part hereof. The said magazines describe some of the reels of film purchased and rented out by complainant and they show descriptions of all of such reels purchased by complainant during the respective weeks of the dates appearing upon said magazines. I can give no better general description of the character of the motion picture films used by the complainant in the State of Kansas than by reference to the descriptions of the various reels as contained in said magazines, and I believe that the other reels of film exhibited in the State of Kansas, but not dealt in by complainant, are of the same general character although of varying artistic quality and interest.

With respect to some of the reels which complainant has in stock, the tax of Two ($2.00) Dollars per reel for inspection would be far in excess of any rentals which could be derived therefrom, and the said sum of Two ($2.00) Dollars per reel is far in excess of the actual cost of inspection of said reel. In my opinion fifty (50c) cents per reel would, in view of the number of reels of film in use in the State of Kansas, be ample and more than sufficient to pay the expense of such inspection.

The exhibition of motion picture film through a projecting machine requires a great deal of technical skill and experience in order to avoid injury to the film, which may be torn or scratched or burned, or wholly or partly destroyed during exhibition. I am advised by counsel for complainant, and verily believe and allege, that in the event of destruction of any reel of film through inexperienced handling during examination by the Superintend-
51 ent of Public Instruction, complainant would have no redress against anybody, and thus complainant would be subjected each week to the risk of damage or destruction of property without compensation.

In addition to the charge of Two ($2.00) Dollars per reel for inspection, complainant to procure such inspection will be compelled to pay a carrying charge to and fro of at least One ($1.00) Dollar per reel, so that the film could be inspected at the place of inspection.

On April 1st, 1913, complainant had about fifty (50) customers to whom it rented films in the State of Kansas, and that number has remained about constant since that time. If said number of customers should not increase, the expense of paying for the approval of films required by such customers during the first three months of the operation of the law would be between Thirty-five Hundred ($3,500.00) Dollars and four Thousand ($4,000.00) Dollars. During the balance of the year the expense would be about Twenty-five Hundred ($2,500.00) Dollars, and the total expense under the statute for the first year would be in excess of Six Thousand ($6,000.00) Dollars. During each year thereafter, assuming plaintiff's business to remain in its present condition, without the natural increase which is to be expected, the annual cost under the statute in procuring such approval will be in excess of the sum of Three Thousand ($3,000.00) Dollars.

The same reels of film which are exhibited in the State of Kansas are rented by complainant to exhibitors in the States of Missouri and Arkansas and the mere fact of same being censored by the Superintendent of Public Instruction in the State of Kan-
52 sas would not relieve complainant of an inspection fee or censorship fee imposed upon the same films by other states, if they should so see fit to impose such fee.

PATRICK J. HALL.

Subscribed and sworn to before me this 14th day of May, 1913.

[NOTARIAL SEAL.] CHARLES H. WOLF,

Notary Public within and for Jackson County, Missouri.

My commission expires Jan. 5, 1916.

Indorsed: Eq. # 11-N. Mutual Film Corporation of Mo., complainant vs. George H. Hodges, Governor, Chas. H. Sessions, Sec'y of State, John S. Dawson, Att'y Gen'l. and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants. Affidavit of Patrick J. Hall on behalf of Complainant. (Copy) Filed May 14, 1913, Morton Albaugh, Clerk.

53 In the District Court of the United States for the District of Kansas, First Division.

MUTUAL FILM CORPORATION OF MISSOURI Complainant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John H. Dawson, Attorney General, and W. D. Ross, Supt. Public Instruction, State of Kansas.

Order.

Upon consent of the solicitors for the respective parties hereto it is hereby ordered, as follows:

(1) The amendments to the bill proposed by the complainant's counsel upon the hearing, and consented to by solicitors for the defendants are hereby allowed:

(2) The amendments to the answer proposed by defendant's counsel and consented to by solicitors for the complainant are hereby allowed;

(3) Counsel for the respective parties are hereby ordered to file corrected copies of the bill of complaint and of the answer herein, and it is hereby ordered, and the clerk of this court is hereby directed to cause the same to be marked filed as of this date:

(4) The affidavit of Lew Nathanson, verified this 14th day of May, 1913, and the affidavit of Patrick J. Hall, verified this 14th day of May, 1913, with Exhibits A, B, C, D and E referred to in the said affidavit of Hall and filed therewith, each marked and signed by said Hall, are ordered to be admitted as evidence with the consent of the defendants the same as if they had been taken by a deposition or in open court, subject to objections as to relevancy, materiality, and incompetency of subject-matter, and as hearsay,

54 and not responsive to the issues, and stating the opinions and conclusion of the witness, all incompetency as to form and method of introduction of the testimony being expressly waived.

That this cause be submitted to this court as upon final hearing upon the pleadings, the affidavits of Patrick J. Hall and Lew Nathanson, and the Exhibits submitted with the affidavits of said Hall, the stipulations and consents made in open court by the solicitors for the respective parties hereto.

That Elizabeth La Bar, upon consent of the parties, be appointed official stenographer in regard to this case; that each of the parties pay one-half of the stenographer's fees, and that the successful party at the conclusion of the litigation recover any amount so paid by him from the other party as part of his costs.

It is further ordered that the complainant have until and including May 31st to make and print and serve and file its brief, and that the defendants be given ten days thereafter in which to serve upon complainant and file with the court their brief herein, and the complainant may have five days in which to make, serve and file a reply brief, all briefs to be printed.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas, May 14, 1913.

Indorsed: Eq. No. 11-N. Order. Filed May 14, 1913, Morton Albaugh, Clerk. Recorded in Eq. Journal # 1 page 81.

55 In the District Court of the United States for the District of Kansas, First Division.

No. 11-N. Equity.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,

v.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants.

Hearing Before Honorable John C. Pollock, Judge, Kansas City, Kansas, May 14, 1913.

Appearances:

For Complainant: Mr. Walter N. Seligsberg, Mr. Eugene Batavia, and Mr. Thomas F. Gatts.

For Defendants: Mr. John S. Dawson, Mr. F. P. Lindsay and Mr. S. M. Brewster.

56 The COURT: If you will now state the matter.

Mr. BATAVIA: Don't you think, Your Honor, we better have a record made of the——

The COURT: Allow me to say, if you will make a statement of the controversy, of your contention, and the State of its contention, you can then introduce such stipulation as to pleadings and formal proofs and so on, and then we will proceed and take the proofs after that.

Mr. DAWSON: It seems to me Your Honor, the first thing for Mr. Batavia to do is to call your attention to some amendments and interlineations he wishes to make.

The COURT: Very well.

Mr. BATAVIA: I desire to call the Court's attention, and have permission to amend the original bill of complaint, as follows:

On page 1 of said bill of complaint, at the end of the last paragraph on said page 1, I desire to add, and do add, after the word "Indicated" "and are citizens of the State of Kansas."

I desire, also, to amend, with permission of the Court, the third paragraph on page 3 of the bill of complaint, which, as amended, will read like this: "That under the provisions of said act, a revenue in shape of a tax is therein attempted to be imposed of two dollars ($2.00) upon each film censored under the act, which means a tax of six dollars ($6.00) per day on the films sold, rented, used or exhibited in the State of Kansas in each moving picture show and means the approximate sum total of three thousand
57 ($3,000.) dollars per day on the films sold, rented, used or exhibited in the entire picture show business of the State of Kansas, meaning, by the provisions of the act, a total revenue to be collected from the films sold, rented, used or exhibited in the picture show business of the State of Kansas of approximately the total sum of forty thousand dollars for the first three months in the beginning of the enforcement of the act, and thereafter means a revenue of thousands of dollars to be imposed upon and taxed upon new films printed and produced and used in the State of Kansas."

I also desire to amend the paragraph following the one just read on page three, with the permission of the Court; and which will read as follows, when amended "That under the provisions of the act it places a tax upon films rented, hired and shipped into the State of Kansas, upon this complainant, of the sum of three hundred ($300.) dollars per week for the period of three months, or approximately a total cost, under this act, of three thousand nine hundred ($3,900.) dollars for the first three months, and about six thousand two hundred ($6,200.) dollars for the first year, to this complainant; and means thereafter a tax against this complainant, on its interstate commerce business, of a similar tax, to be imposed upon all new films produced and printed and sent into the State of Kansas by this complainant, provided the business of this complainant does not increase, of the sum of about thirty two hundred ($3,200.) dollars each year."

I also desire to amend the bill of complaint by adding to the end of the paragraph on page 6 which ends with the following words "April 1913" another paragraph, which reads, as follows, with the permission of the court: "That by reason of the nature of the motion picture business and of the methods by which it is necessarily conducted between complainant and its customers in the State of Kansas, and by other film exchanges and their customers in
58 said State, complainant and other film exchanges must necessarily bear the expense of censor-hip and approval of films, otherwise the amount of the charges therefor would necessarily be doubled or trebled."

I also desire to amend the paragraph on page 8 which follows after the quotation set out on page 8, which purports to be a quotation of an advertisement in the Topeka State Journal; the amendment in this paragraph is by interlining the words, "and also of the State of Kansas" after the words "United States" in the third line of said paragraph.

I understand from the defendants' counsel that all of these amendments are made with his consent.

Mr. DAWSON: That is all right, Your Honor.

The COURT: There are no objections then to the making of the amendments?

Mr. DAWSON: No objection.

The COURT: Then it will be ordered that the amendments be made. However, it is further ordered that the bill be redrafted and filed as of this date as an amended bill, including the parts that have been substituted or added by amendment.

Mr. DAWSON: If Your Honor please, I would like to rewrite our answer and to admit or deny these new allegations.

The COURT: I suppose that is satisfactory.

Mr. BATAVIA: It is.

The COURT: It is then ordered the answer be redrafted
59 as an answer to the amended bill and both the amended bill and the answer thereto be filed as of this date. That makes the issues.

Mr. BATAVIA: I also desire to have the Attorney General of record waive the interlocutory feature of this bill. In other words, this is a bill of complaint addressed to three of the judges of the Honorable Court to hear it, being brought up in the way of an interlocutory injunction as to the constitutionality of a legislative act passed by the legislature of Kansas. We have agreed to try the merits before your Honor, and I understand that the Attorney General representing the defendants, waives the injunction feature of this bill of complaint so we can have it tried before Your Honor on its merits.

Mr. DAWSON: Perhaps I better state my views on this subject. I am entirely willing to try the case before the judge of this Court, and will either abide by the judgment of the judge of this court or appeal; I do not desire to inconvenience the Court or other courts in the neighborhood by calling other Judges in to sit with His Honor. Now, in this respect it amounts, perhaps, to a waiver of this interlocutory feature, which has been suggested, that there has been and will be no further prosecutions under this act any more than if the interlocutory order had been formally issued by the three United States Judges, but I do not wish the State to be handicapped by this attitude, and if I believed that the suit was not being prosecuted vigorously, and with all due and convenient speed, I would insist upon all the formalities. But this Court can decide this case so far as I am concerned without any further Judges sitting on the bench and I will be bound by the judgment or appeal, in the formal way. Now if that is proper, that is my understanding and I will agree to it.

60 The COURT: Allow me to suggest: The statute providing for a hearing in this Court of an interlocutory or temporary injunction, and which requires such hearing to be before three Judges, in the opinion of this Court, has no application whatever to a trial of a matter of this character in equity, where, at the conclusion of the trial a final decree is entered, so far as this court is con-

cerned. And, as I understand it, the Attorney General consents to now proceed with the final hearing of this case in this court, and is of the opinion that a single Judge may conduct the final trial of the case. Is that satisfactory all around?

Mr. DAWSON: Yes, that is the way the law is as I understand it.

The COURT: Very well.

Mr. BATAVIA: If the Court please, it is also understood that the affidavits in support of the bill are considered filed as a part of the bill.

Mr. DAWSON: And considered as deposition.

Mr. BATAVIA: And considered as deposition, together with the exhibits marked A, B, C, D, and E attached to the particular affidavit of Patrick J. Hall.

The COURT: As I understand, there is no objection whatever from solicitors for defendants to the reception of the affidavits as proofs on this trial of this case in this court.

Mr. DAWSON: No objection so far as formality is concerned.

The COURT: Then they will be received.

61 Mr. BATAVIA: Now, if the Court please, before we go into the reciting of the facts in our bill of complaint, I desire to have the Court understand generally the nature of the business as conducted by the complainant, and their particular interest, therefore, in the legislative act which is attacked by the bill of complaint. For that purpose I will have Mr. Selig-berg make that statement, he is more familiar with the facts than am I.

The COURT: May that not be made as a part of the statement of your case as presented by the bill?

Mr. BATAVIA: As a part of our statement, yes, Your Honor.

The COURT: Proceed.

Mr. SELIGSBERG: If your Honor please, perhaps the only excuse for my making this statement, in lieu of one of my associates, is, I have had a very great deal to do with this motion picture business, and there are certain of the facts in connection therewith which we are very desirous Your Honor and our opponents shall understand very clearly.

The motion picture is a series of instantaneous photographs of action upon the stage or in the open—either action that may be staged or action that may be spontaneous—by the projection of these photographs, or of positive prints of them, upon a screen, which projection is made with great rapidity, and an illusion of motion as it actually occurs appears upon the eye, and one sees these constantly changing photographs as one photograph changing and showing action.

The motion picture business in this country has reached very great proportions, and it is generally divided into three branches.

One set of people take the photographs, they pose and take

62 them, or take them wherever the action may be occur-ing.

An entirely different set of people exhibit these photographs in motion picture theaters, and a third distinct set of people purchase the photographs from the manufacturer and distribute them among the theaters. The manufacturers in this country make their

pictures in California, largely in the States of New York, and New Jersey, and a great many pictures are made in Florida and some are made in the State of Illinois. So far as we know, and we offer proof on that subject, no motion pictures are manufactured in the State of Kansas at all. A great many of the motion picture films in which this complainant deals are either made in Europe or other parts of the world.

The reason the motion picture film exchange exists, is the following: The motion pictures come out, for the sake of convenience, in lengths of about one thousand feet which are wound on a circular reel. The average price of one of these reels is one hundred dollars, ten cents per lineal foot. The public demands of the theater that when it pays its five or ten cents to go in, there be shown any where from three to six pictures, and the business of the theater requires that the proprietor be able to change its program at least twice a week and sometimes six or seven times a week. The result would be, a motion picture theater proprietor, if he had to buy his film outright, would have to buy sometimes fifteen or eighteen of these thousand foot one hundred dollar reels per week, and that would be prohibitive. For that reason, almost as soon as the motion picture film became an article of commerce, the film exchange was organized. The film exchange purchases the reels of film from the manufacturer and rents them out to the exhibitor. As a matter of convenience in the business, the manufacturer announces long in advance the number of reels which he will produce, the number of reels of film which he will publish during particular weeks in the future, and each of this reels is assigned what is known as a release
63 date, prior to which it may not be shown at any theater in the United States. The purpose of establishing the release date is so that the film exchanges may compete among themselves, and a film exchange in Omaha shall not receive a positive print of the same negative two or three days before a film exchange in Kansas City, and thus be able to have it shown by exhibitors in various localities and kill the market for its competitors. The creation of the release date simply means that all start in business on an equality. The film exchange fixes the amount of its rentals, with regard to three factors. The first factor is, the quantity of film leased or hired out to the particular theater; the second feature is the novelty of the film, the age of the film, dating its age from this release date. Naturally, a man has to pay more for three pictures never shown before in a town than for pictures which have been there before, for naturally he can attract a larger audience to an entirely new show as he is not restricted to the public who may not have seen those particular pictures. The third feature which determines the amount of the rental is the frequency of the changes in the week; it is figured on a weekly basis, and if he gets two changes he naturally pays less than if he gets seven &c.

This complainant has in stock at the present moment about one thousand reels of motion pictures which have been released in the State, that is, whose release date has passed, and those one thousand reels cost in the neighborhood of one hundred thousand dollars

This complainant, in order to continue its business, purchases in each week twenty one new reels which it has never had before,—depicting subjects which it has never had before—and it pays for those twenty one new reels about twenty six hundred dollars. There are four other film exchanges renting films to exhibitors in the State of Kansas who purchase the same brands of film and duplicate copies of the same subjects as the complainant. And these
64 four film exchanges are situated in Omaha, Nebraska, St. Louis, Missouri, Oklahoma City, Oklahoma and Denver, Colorado. There are also five or six other film exchanges also renting films in the State of Kansas which deal in motion picture films, but of different brands and different qualities from the films dealt in by this complainant.

Now it very often happens that the film exchange in Denver will rent out films to an exhibitor in one part of Kansas, while duplicate copies of the same subjects, simply other positive prints of the same negative, are exhibited by exhibitors hiring their films from the St. Louis office, in another part of Kansas, a customer of the Kansas City office in another part of Kansas, so there may be at one time coming into the State of Kansas three or four copies of the same subjects, all of which have to be censored by the State Superintendent of Public Instruction. Now, if the theater owner were to bear the burden of paying this tax, there would be in the first place great duplication of censorship, the burden upon the State Superintendent of Public Instruction would be immense; the burden upon the business would be doubled or trebled because the man in the western end of Kansas would have no means of knowing what the exhibitors in the east end of Kansas were doing, and with five hundred exhibitors it would be almost impossible to keep track of what subjects had been censored and what had not. That burden upon the exhibitor of exhibiting a reel of film at his peril without any positive of official information that it had been censored, would be impracticable, and for that reason the only practicable way this act could be enforced would be for the clearing houses, which are at least limited in number, about twenty five of them, and through which all the films pass before being exhibited, to undertake the procuring of the approval of the films.

There is another very good practical reason why the exhibitor would never bear the burden of the censorship, because, an
65 exhibitor who would receive a reel of film that had never been in Kansas before would turn it back to the film exchange and say, "Give me something that has been censored and let somebody else get this reel first and pay the tax." They would absolutely refuse to bear that additional burden, and the only way that business could be done, both with respect to the simplification of the procedure and with respect to the practical conduct of it, would be for the film exchanges, like the complainant, to undertake the procuring of the censorship, and that practically establishes the necessity of the bringing of this bill by complainant rather than by exhibitors.

One word more as to the character of motion pictures. We hear

a great deal of indiscriminate comment upon immoral pictures or indecent pictures. I confess I have seen a great many pictures; I know hundreds of people who are engaged in the business, who are enthusiasts over most of the pictures and go to see the pictures all the time, and I have never yet heard of an indecent or obscene picture being shown in any house in this country, or suggested that it had been done. The character of the pictures is of the highest. They are usually dramatizations of standard novels or short stories. There are only seven or eight principal plots in the world, and the moving pictures are, like the ordinary novel, dramatizations upon the screen, in various forms, of these seven or eight original plots. Among these, the subjects which have been dealt with by the films which this complainant has rented out in the State of Kansas, recently, have been the dramatization of Oliver Twist, of Nicholas Nickleby, of part of Pickwick, and parts of David Copperfield, all the Dickens novels, several of the novels of Charlotte Braeme, Dora Thorne, East Lynne, Undyne, Scott's Guy Mannering, and certain of the Shakespearean dramas, Romeo, and Merchant of Venice, Mid-summer Night's Dream—all have been produced on the screen in the last year or year and a half, and
66 most of them have passed through the complainant's clearing house. Many of the subjects are scientific subjects, many showing uses of electricity, showing the life and development of various forms of animal and plant life—various scientific subjects have been carried out on the screen. There is a regular feature in which this complainant deals, what is known as a "Weekly," and which shows in each week, upon the screen, through the moving picture, events of current interest, such as the inauguration of President Wilson, the funeral of the King of Greece, the work on Panama Canal, &c. Everything of current interest is snapped up by moving picture photographers, put into the films and put out on the screens. Then there have been some wonderful scientific pictures of expeditions like Captain Scott's to the South Pole &c. The whole tone of the film business is far superior to the tone of the theater proper. The pictures always point a moral, as the expression goes. Vice is always down in the end and virtue seems to be always triumphant. But that is necessarily so, because the public who go to the moving picture shows, is, after all, a discriminating public, and wherever pictures of a poor quality have been suggested, immediately the theater has dropped out of existence. As a practical matter, these people have, for their very life, had to demand continually better and better photographs, and better and better quality and character for their films. As I said to your Honor before, I do not believe the defendant can cite a case of immoral or obscene films being exhibited. I do not think such a thing exists or has ever been brought into the State of Kansas, or any other state of the United States; so the act is holding something in terrorem over the exhibitor to meet something which does not exist.

With this statement of the facts, my associates will con-
67 tinue the hearing.

Mr. Batavia: This bill of complaint—if your Honor prefers me

to read it, I will do so, however, I think I can cover the ground virtually by stating it.

The COURT: I will prefer you to state it.

Mr. BATAVIA: The formal parts of the bill, such as diversity of citizenship and amount in controversy, are stated; the fact that complainant is engaged in local and interstate commerce, renting, leasing and in sale and delivery of what is called "Films" in the State of Kansas, is also stated in this bill by complainant, and the nature, character and production of the films is also stated, showing that it is the scenario of an original story, or theatrical production, conceived by a writer or author. This is a sketch of a plot, or chief incidents of a libretto or play, a drama, a prose of poetical composition, depicting human life and conduct on a stage. It may be also a reproduction of inanimate objects, scenery, picturesque views, animals, and is descriptive, educational, instructive as well as amusing.

The bill also states the manner of how this film is produced and how it is projected upon a screen or canvas. It says the Scenario, story, or thing produced, is reproduced or printed by photographic impression on a sensitized celluloid film, with the aid of specially prepared lenses, so arranged that the impressions may be taken in rapid succession on a continuous length of such celluloid film, and which is printed thereon by the aid of Nature and lenses; that copies are made of this print, and they are produced and printed, which resulting print is called a film, and which film is distributed for display, and which by mechanical apparatus and electrical devices are thereafter shown upon a screen, life-like and active and in motion, showing to the person viewing the film what actually
68 took place when it was taken.

The bill of complaint also states, if the Court please, that there are at present about five hundred moving picture shows or theaters in the State of Kansas, and that each one of those moving picture theaters use on the average of about three films per day, making a total of about fifteen hundred reels of film in the State of Kansas on the day the act complained of took effect; the bill states the act took effect April 1, 1913, and that under the provisions of the act complained of, passed by the Kansas State Legislature, a revenue of two dollars per reel of film is attempted to be imposed for the purpose of inspection of the film. The legislative act complained of provides that any person, firm or corporation intending to sell, rent or exhibit a moving picture film or reel within the State of Kansas, must, before the exhibition of such film, submit the same to the State Superintendent of Public Instruction for his inspection and approval, and where the film is moral, not immoral or obscene, the legislative act provides that the film must have the approval of the State Superintendent of Public Instruction, and should he not approve it there is a manner of appealing from his disapproval to the Governor of the State of Kansas, the Secretary of the State and The Attorney General, who are a board of appeal, and who will stamp their approval on it provided they approve it.

The bill also provides that in order to get inspection of a film a

fee of two dollars be paid to the Superintendent of Public Instruction, which fee is to be turned over by the Superintendent of Public Instruction to the State Treasurer, and which is to be charged to the general revenue fund of the State. In other words, the fund collected for the inspection and censorship of these films is not set aside in a particular fund, out of which the cost of the inspection
69 is to be paid. The bill does provide that the Governor may authorize the employment by the Superintendent of Public Instruction of one or more additional clerks in his office, as may be necessary, at a per diem not to exceed three dollars per day for each day actually employed; which per diem shall also be paid out of the general revenue fund on warrants duly issued and payable in the same manner as other clerks in said office are paid.

The bill also sets out that the cost of this inspection or censoring of the films would aggregate about forty thousand dollars to all of the film exchanges attempting to do business in the State of Kansas for the first three months. That thereafter the inspection fee would amount to thousands of dollars.

The bill also alleges that to this particular complainant the cost of inspection to it would be about three hundred dollars per week for three months, amounting in all to thirty nine hundred dollars for the first three months, and about sixty two hundred dollars for the first year, and thereafter about thirty two hundred dollars each year.

The bill also alleges that the Superintendent of Public Instruction is the only officer authorized to inspect and stamp his approval upon these films except when he disapproves them, that the party presenting said films for inspection can take the matter up by an appeal to the Governor, Secretary of State and to the Attorney General.

The bill also alleges that by reason of the necessities of this business, the only proper parties who would necessarily bear the expense of this inspection would be the film exchanges, and in particular your complainant.

We first complain in our bill that the said act in controversy is in conflict and violation of Section 10, Article 1 of the Consti-
70 tution of the United States, in this: That as provided by said Section 10, Article 1, no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for the inspection of said Article to be inspected. And that the particular act in controversy is in violation of this Section 10, Article 1, because it provides a revenue and not an inspection.

We secondly advance in our complaint that this legislative act is in violation of the Amendment to the Constitution of the United States, to wit, the Fourteenth Amendment, more particularly Section 1, of Article 14, in this: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. This act complained of abridges the privileges and immunities of the citizens of other States by placing an embargo and prohibition on the rights of this complainant and other citizens in transacting legal and lawful business in the State of Kansas which

it has a right to do in that no provision in the act is made that any expenses, whatever, shall be paid for such inspection out of this fund, which the act declares shall be the general revenue fund of the State; in effect, by reason thereof, to place an embargo on the business of the complainant and others, making it prohibitive against this complainant and others, even if the act were otherwise effective, from securing and obtaining a prompt, efficient censorship or inspection, so that the business itself can be continued within the State, while, at the same time, the act provides a criminal punishment upon the people of the State, and out of the State, against the infringement of the act, when it is not made possible to comply with the act, for reasons above stated.

The complainant also alleges that by the very reason of this prohibition in the act itself, and that the act could not be carried
71 out, the Attorney General had caused to be published in the Topeka State Journal the following advertisement:

"Competent and public-spirited men or women to inspect moving pictures. Applicants must be willing to trust to 1915 Legislature for their pay. No funds available before that date. Send reference with application to W. D. Ross, State Superintendent of Public Instruction, State House, Topeka, Kansas."

We further allege that this legislative act in question is in violation of the Bill of Rights of the State of Kansas and also of the Constitution of the United States, in that it puts a restraint upon the citizen, in that, under the bill of rights, no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will, on any subject, being only responsible for all abuse of that liberty. We set out at length the evident intention of the Bill of Rights thus expressed, that it is either penalty or punishment and not prevention; we set out at length that it is against the right of freedom of the press as guaranteed by the Constitution of the United States as well as the Constitution of the State of Kansas.

We set out in the bill and allege in the bill that complainant is in this film business, which is but an advancement of printing or writing, and that neither the State of Kansas nor any other State can take away the right of freely publishing or printing or producing the film without a trial by jury. In other words, our theory of this matter is based upon the right of this complainant to freely go into the State of Kansas, or send its films into the State of Kansas, being guaranteed that right by the Constitution to do interstate commerce; and further, that this complainant is in a business similar to
72 that of a publisher of books, a publisher of a newspaper, or a publisher of any written matter, and equally with the rights of the publisher of a newspaper, a book or other matter of that kind, the things printed or published and used, rented or hired or sold by it cannot be censored; and if they are immoral, or if they do not meet with the ideas of the people of the State of Kansas, that the people of the State of Kansas have a statute which punishes the publication or printing or sending of obscene matter or immoral matters, and for that reason we ask this court in equity to declare the act unconstitutional and of no avail.

(12 o'clock M. Recess, until 2 o'clock P. M.)

73 (2 O'Clock P. M.)

Mr. DAWSON: May it please Your Honor, a good many of the allegations of complainant's bill are admitted by the answer, not, however, to the extent that it would secure a controlling judgment if the old time demurrer was still in vogue.

We have admitted the corporate capacity of the complainant, as alleged and pointed out to Your Honor. As alleged, they are a Delaware corporation authorized to do business in Missouri, and that so far as their pleadings show they are not authorized to do the business of exhibiting moving picture films, and neither by their pleadings not by their corporate authority would they be, or are they authorized to exhibit moving pictures in Kansas.

We, of course, admit the formal allegations concerning the official capacity of the defendants.

We admit the complainant is engaged in interstate commerce, denying in so far as it is alleged, although in fact I do say they do not squarely allege they are engaged in local business, although I did notice from the statement of counsel this morning that they wish to be considered as doing a local business. That is not in the pleadings as I have been able to discover.

We admit there are about five hundred moving picture shows in Kansas, and that they do use about three films per day.

We admit, of course, the accuracy of the act of the legislature set out in complainant's bill, and perhaps I ought to run over, just a minute, substantially the terms of this new act.

It is an act which took effect on the first day of April, and it makes it unlawful to exhibit these moving pictures in Kansas until after they have been inspected and approved by the State Super-
74 intendent, for which work of inspection and approval he is authorized to charge a fee of two dollars on each film. The act also provides that an appeal, without any cost whatever, in a summary manner, may be taken from an adverse determination by the Superintendent of Public Instruction to a Board composed of the Governor, Secretary of State and Attorney General. It is a sort of summary administrative review. And it is the duty of this Board if they find the pictures are neither indecent, obscene, sacrilegious, immoral or tending to corrupt the morals, they must be approved.

The COURT: Is there any provision for resort to the court to review the act of the administrative body?

Mr. DAWSON: Not by the terms of the act itself, Your Honor, but I need not say to a lawyer so well versed in Kansas law as yourself, that there is inherent an appeal in Kansas jurisprudence to the court.

The COURT: I am merely speaking of the terms of the act.

Mr. DAWSON: Not in the terms of the act. And by the way, I mention that fact in my answer; that for arbitrary action, not only could that be corrected by mandamus, but damages awarded in the mandamus suit from the oppressive action of either of the Superintendent of Public Instruction or this Board.

Now about all of consequence that we deny is that this is a revenue

measure; I say, about all, I think, of consequence, and yet this denial, in my judgment, does not raise an ordinary issue of fact, it raises, to my mind more an issue of law.

These is no great dispute about the fact that there are about a hundred new films come into the State of Kansas every week.

75 That there were about fifteen hundred films in this state on the day that the act took effect; if it had been possible for the Superintendent of Public Instruction to have approved all of those pictures in one day the money that would have been derived from such inspection would have been three thousand dollars; but it is our best information, and I do not think there is any material issue of fact raised on this question, that there are about one hundred new picture films come into the state each week; that of course, would be two hundred dollars. So it seems to me it is more a question to be determined by arithmetic than it is by ordinary principles of evidence.

The COURT: However, if those are the averments of your answer you are widely at variance with the averments of the bill.

Mr. DAWSON: We are, Your Honor, and yet we have been getting together very rapidly; because, it originally said in the bill, before amended, that the revenue derived will be three hundred and sixty thousand dollars a year—doubtless their best judgment at the time—but upon further reflection and with leave of Your Honor, they have amended that so as to read forty thousand dollars per annum, a reduction of nine hundred per cent.

The COURT: I had understood the averment of forty thousand dollars was as to the first three months.

Mr. BATAVIA: That is correct, and many thousands of dollars thereafter; but the Attorney General is correct that the averment in the original complaint stated it would be three hundred and sixty thousand dollars for the first four months; there is a large difference, we recast the figures because we found we were not correct as alleged in the first bill.

76 Mr. DAWSON: Proceeding further, there is a part of this answer which is in the nature of a new or perhaps affirmative defense. Before I go into that, there is one matter alleged in the bill that I wish to speak of, and that is, that the Attorney General and the Superintendent of Public Instruction caused an advertisement to appear in The Tokepa State Journal, as follows:

"Competent and public-spirited men or women to inspect moving pictures. Applicants must be willing to trust to 1915 Legislature for their pay. No funds available before that date. Send references with application to W. D. Ross, State Superintendent of Public Instruction, State House, Topeka, Kansas."

Defendants deny that they ever authorized any such advertisement, and defendants believe, and therefore allege, that that pretended advertisement was merely the work of a clever and jocular newspaper reporter in attempting to bring before the public in a humorous way some alleged imperfections of detail in the legislative draftsmanship of the act of the Legislature in controversy.

Answering further and on their own behalf these defendants allege

that by operative interpretation of said act these defendants, charged with the enforcement thereof, do hold and have held and will continue to hold that a moving picture film once censored by the State Superintendent of Public Instruction and the fee of two dollars paid therefor can be repeatedly exhibited anywhere in Kansas and in any and all moving picture theatres, or elsewhere, without any further payment of fee. And I only mention that in this general way at this time because I think from recitals of the bill, and from discussion of counsel and some of these moving picture men, that they thought that every picture would have to pay—before exhibition would have to pay a fresh fee. And we set out in detail
77 our administrative interpretation, which our courts have held and I think Your Honor was on our bench at the time—that the operative interpretation placed upon an act by the officials whose duty it is to carry the law into effect will be given by the courts grave and ofttimes controlling weight. And we want to emphasize the fact that when a picture is once censored, it is censored for all time. And our answer sets out, further, upon information that we have derived from the moving picture men that these pictures come into the State and go from one theater to another—that is, when Mr. Nathanson gets through with a picture it will go to another man in the same town—likely in another town, and move from town to town for three or four weeks and drift out of the State, perhaps to Oklahoma, and return to the State for a month or two, and then drift out of the state again, and come back into the State, but a picture once inspected and approved is inspected and approved for all time.

The COURT: It would be manifest, in the eyes of the State, a picture good enough to be exhibited in Topeka, is good enough for Wichita.

Mr. DAWSON: Yes, indeed. Now, in order to show, in our answer, how efficiently even a somewhat crudely drawn act is being administered, we set out in our answer the method by which this board of appeal- acts. About the first day that this act became effective some of these picture men brought up forty, fifty or sixty pictures, and Superintendent Ross, of course, was swamped; I think he censored two or three and threw his hands up, and I don't mind telling Your Honor that he didn't feel very kindly towards the Legislature for imposing this duty upon him. But the Governor and Mr. Sessions and myslef did not take it so seriously, and
78 we got up a little blank like this: "State of Kansas. Moving Picture Censorship. In the matter of the appeal of —— from the refusal of the State Superintendent to approve the picture film entitled so and so. This Commission finds such picture film to be neither sacrilegious, obscene, indecent, immoral, nor does it tend to corrupt the morals; therefore the same is approved. Dated and signed by the Governor, attorney general and secretary of State, with an indorsement of the State Superintendent, signed by the State Superintendent of Public Instruction." And we made summary disposition of these matters, and by operative interpretation. These men certainly could not and would not complain of that; the mere

fact that the State Superintendent could not approve them all the same day, or this large number in any one day, we treated that as a refusal to approve, and we very promptly approved them all.

Now there is one other matter which I wish to point out in my answer, and it is short:

Answering still further defendants allege that this complainant has no interest in the act of the Kansas Legislature complained of nor does the complainant exhibit pictures to the people of Kansas in moving picture shows, or elsewhere, nor does the complainant come directly under the provisions of said act, nor can the complainant, as a Delaware corporation licensed to do business in the State of Missouri, transact any intrastate business within the State of Kansas either with or without the payment of an inspection fee under the act complained of, nor is the complainant liable to any criminal prosecution under the act complained of, but only the persons, firms partnerships, companies and corporations which actually do exhibit pictures uncensored within the State of Kansas in violation of the act.

79 Now if this complainant is not liable, and we say it is not liable to prosecution, how then can it maintain this suit to restrain the State officers from enforcing that law and from prosecuting. Only the persons, firms, partnerships, companies and corporations which actually do exhibit pictures uncensored within the State of Kansas in violation of the act are liable. And defendants further allege that upon its own showing this complainant has brought only mere moot questions into this Honorable Court.

Now, it is also a part of our answer and defense that if the legislature had the power to enact this law, the wisdom or the expediency of the law is of no consequence; its crude terms, the awkwardness with which it is drawn, are matters of no consequence; the wisdom of the law is for the legislature, and we cannot substitute our judgment for their judgment. If it is any comfort to Brother Gatts, I am willing to say I could have drawn a far better act than this one.

Now they contend that fault is to be found—and grave fault is to be found with the matter in constitutional law, because the money derived from the inspection fees are paid into the General Revenue Fund of the State. Your Honor will take judicial notice, and we will be glad to cite the particular statutes, that large appropriations are made by the legislature out of this fund, and the legislature did not see fit to segregate the amount of money which I, as one of these defendants, may spend for the enforcement of this act. Now, if it was proper for the complainant to bring the Governor and Secretary of State and Attorney General and State Superintendent before the Court, it is because they had duties to perform under the act, and they are the servants of the State, and the State is paying us out of its general revenue fund. Your Honor will take note of the fact that the legislature gives the Governor ten thousand dollars a year to enforce this act and other acts; they gave the attorney
80 general ten thousand a year (beginning with the first of July twenty eight thousand a year); The Governor for the next

two years will have all the balance that is left of the ten thousand, which will be two or three thousand, and twenty five hundred of the five thousand for the second year, so he will have five thousand a year for the enforcement of this and other acts. And the State Superintendent is paid a salary out of the General Revenue Fund, as are his clerk, and any additional clerks in his office made necessary by this act. And for fear this appropriation for clerks and stenographers and the contingent funds would not be enough to administer this act, the legislature made an extra appropriation of a thousand dollars for the purposes of this act. Now, I do not think it is fatal to this bill because the legislature first appropriated the money to pay for the administration of this act out of the General Revenue Fund, and then says the fees provided shall be turned into the General Revenue Fund.

The COURT: Excuse me a moment: there is one matter I want to clear up. You say that as presented this is a moot question; that this complainant has no interest in the subject-matter of this suit for that it is not touched by the act itself. Now, suppose I am a citizen of Delaware, but I am engaged in selling my wares in the State of Kansas, either by correspondence by the citizens of this State with me in Delaware, or, I send my representative from Delaware into this State here — take orders and submit them to me in Delaware. Suppose that is interfered with, in, of course, an unlawful manner, by the legislature of this State. May I not question that act? Allow me to go a little further; As I understand the bill from, of course, the statement heard, this complainant is engaged in the purchase from those who manufacture of these moving
81 picture rolls of films; they send their representatives into this state and rent them, reserving title to the property, I apprehend, because they say it is a rental or lease. Now, having leased them, made an engagement they shall be exhibited, passed from one to the other, may I not protect that business from unlawful interference by the State?

Mr. DAWSON: You can, Your Honor, and so could the Delaware corporation. Now, whether it is a citizen of Delaware, or a corporate citizen, engaged in the interstate commerce of these pictures, and Your Honor as a citizen of Delaware might send your agents into Kansas to solicit business (citing cases), we do not concern ourselves about that; that is not against the law; the law is the unlawful exhibition of pictures, and then it is a matter of no consequence whether it is a citizen of Kansas or Delaware.

The COURT: Wait, Wait: Suppose you put the tax on the parties, the lessee, or the parties who rent, so high that I cannot handle my wares in the State (just a moment). Suppose that you had said instead of charging a fee for inspection, suppose you had said, for the purpose of producing a revenue for the State we will charge two dollars for examining each one of those rolls of films, would your answer be constitutional?

Mr. DAWSON: I think not, Your Honor.

The COURT: Why should not I, when I am interested in leasing my reels of picture films to exhibitors, and if you place a charge

upon them that will destroy my business, why have I not a right to be heard?

Mr. DAWSON: The answer which occurs to me at this time is this? That if a Delaware institution is engaged in a business which
82 cannot be lawfully conducted in Kansas—cannot be lawfully conducted in Kansas—and it thereby curtails their business with Kansas people, there is no remedy.

The COURT: I am not speaking of that; I am speaking now, suppose that this should be on its face, by the Legislature, denominated a revenue measure?

Mr. DAWSON: Then I should say absolutely that the law is void, and yet, I may be conceding too much.

The COURT: But, I am getting now at the question as to whether this complainant has such an interest that it may challenge the validity of this act, because, if not, we have nothing to do.

Mr. DAWSON: Well, now, I have studied the thing seriously, and really, I do not think it has. Now this was not put in merely to make a longer answer; I put it in conscientiously and seriously, that I do not think this corporation has a ground of grievance. Because, they are asking that I be restrained from what? From prosecuting, not them, from prosecuting Lew Nathanson; let Lew Nathanson complain himself.

Then it is true, we will submit, I admit this law could be much more easily and wisely administered if the film company would submit the pictures to the State Superintendent and get the approval and then charge a few cents extra to Lew Nathanson and to one hundred other moving picture men for the use of these films, with the tax attached; but the mere fact that a wiser and better plan could have been devised—suppose it had been devised—we could not have compelled them to have complied with it without our jurisdiction: there is no way on earth we could have brought this Mutual Film Company into Court.

83 The COURT: But for that reason it does not follow that the complainant may not have such interest in the litigation and in this act that it may not challenge it. Suppose that I am engaged in the business of renting any commodity, a vehicle, an animal, or anything, to the citizens of this State, and the State Legislature should attempt to create a revenue out of that business which I have built up and should levy against me, (I am speaking now of a revenue, merely getting at the question of interest or tax on that business), that it would destroy my business in the State which I had built up; do you think I could be heard to complain?

Mr. DAWSON: I think you could. Now, while I think this point is well taken, which we press both in our answer and our briefs, yet, I will say this: that I should think it not altogether fortunate if we won on that point, for the reason that another method of bringing the vital points before Your Honor could be devised.

Now, I have called your attention to the large appropriations that are made out of the General Revenue Fund for the administration of this and other acts.

The COURT: Just a moment. There is no provision that I know of in the Constitution of the State that requires an inspection fee to

be paid into any fund of the State. Now, for instance, if this was a fee or a penalty under our Constitution and you attempted to put it into the General Revenue Fund, and there was some other fund like the School Fund, as there is, where it is provided all penalties should go, then your act would be unconstitutional as many times decided. But you have no constitutional provision as to what fund an inspection fee shall be paid into, and the presumption would be, so long as it is only an inspection fee, that, the State would administer that.

I suspect your question in this case, stripped of its useless
84 verbiage, is this: Has the State by this act attempted to raise a revenue on interstate commerce; if it has, the act is void. If it is a proper subject of consor- or inspection, and if the matter is such as any tribunal except a judicial tribunal may pass upon, and the fee charged is a reasonable inspection or censor fee, then it is within the power of the State. So we need not go around the bush; we have got to come right to it.

Mr. DAWSON: Now, Your Honor, on this matter of where the funds should go.

The COURT: I do not think you need discuss that, because, in so far as this complainant is concerned, the State may provide for the payment of its officials out of any fund or in any manner it sees fit, and so long as the charge made is for a legitimate purpose, made by persons who can determine the question to be determined by an inspection or censorship then I suppose the State may arrange to pay those people or not, or they may place the fee, if it is an inspection fee, in the General Revenue, and pay it out of that, so I do not think you need go into that. I may be getting ahead, but I am afraid the act would not be questioned on that ground.

Mr. DAWSON: Before touching on that point, in order to be entirely fair with Your Honor, I will say, that is another suit which is brought up right now, I think before Judge Dana, on the new fire marshal law, which provides the fire marshal's salary shall be paid out of the gross proceeds of premiums paid by fire insurance companies to the Superintendent of Insurance; and the Superintendent of Insurance and the Fire Marshal are figuring a certain percentage on all the business the corporation does which not only does a fire insurance but a tornado and hail; and I am very much
85 afraid we cannot impose a tax upon the tornado and hail business of that corporation for the benefit of——

The COURT: Let us go a step farther; suppose this act instead of providing simply that this fee should be paid into the General Revenue fund of the State, and from there paid to the Superintendent of Public Instruction and his assistants who perform the service of this inspection; there is nothing wrong about it——

Mr. DAWSON: As I understand, they are complaining because it does not say so in so many words; my answer is——

The COURT: I will hear from them. I am not caring about that.

Mr. DAWSON: On this vital point they do not allege that two dollars is an unreasonable inspection fee, that is not alleged in the bill.

Mr. GATTS: We allege it is prohibitive in some respects.

The COURT: General, there is going to be in this, another question that I am going to want to hear from you solicitors on. It does

not bristle much in this case, but it is this: Suppose I am engaged in the business of publishing books and of renting them to citizens of this State for hire that they may read the books, returning them to me; a perfectly legitimate business. Can the State place it within the power of any except a judicial tribunal to determine whether these books I am thus circulating are proper books for the citizenship of the State to read?

Now, if I libel any one, I am liable under the laws; if I attempt to use the mails and the matters are lewd and obscene, I am
86 punished by the general government. But can the State create a censorship on my writings or publications?

Mr. DAWSON: Well, I should say yes; I think outside of taxation matters, and I am not going to be very dogmatical about that, I believe that no sort of official business may be transacted lawfully by an officer in Kansas unless there is inherent in the statute itself, or by the general principles of the law, an opportunity for the injured man to have a day in court.

The COURT: Well, the thought that is in my mind arises, of course, from a radically different source.

Now, if my publication is an improper one, the postal authorities (it is carried through the mails by the Government exercising a monopoly of the carrying of the mails) may prohibit by a fraud order. Of course, they may punish if it is obscene. I am coming now to the educational question. Suppose it were admitted—suppose I was furnishing these films, renting them, for the sole purpose of enlightening intelligence, educational, and that is what this is; just whether there is a question in this case——

Mr. DAWSON: I think I get Your Honor's view point; now why does the National Government have the power to bar the use of the mails; it is because the Constitution has given Congress the power to regulate interstate commerce.

The COURT: No, so far as the mails are concerned.

Mr. DAWSON: The constitution speaks of the mails; but in regard to the regulation of interstate commerce; now, then so far as the State governments are concerned, no one would say that their power to regulate intrastate commerce is any less prominent than
87 the power of the National Government to regulate interstate commerce, except in so far as the regulation of the intrastate commerce may impinge upon the power of the general government.

The COURT: That is not settled, is it?

Mr. DAWSON: If the regulation of the local commerce does not infringe upon the powers of the national government it will go without saying the state government may regulate local commerce. Now, then while it is true that ordinarily an injunction will not lie to restrain libel, those cases all go off on the point that they will not lie at the hands of the injured party because he has recourse to his action for damages and his right to criminal action, except in case of a public official, and they cannot rely on it. But a different question comes up where the matter is one of public interest. While an individual citizen may not ordinarily invoke injunction to restrain libel, the public is in a different light, and there are no decisions I have been able to find (and we have searched with con-

siderable diligence on this point) that at its instance, the instance of the State or the Government, either local or national, it cannot restrain.

The COURT: This is true; Suppose there is running in a city—suppose these moving picture houses should be attempted to be kept open on Sundays in the face of an ordinance passed by the City under lawful authority, of course, prohibiting it; these authorities suppress that. Suppose on any occasion there was a picture exhibited which is immoral, is sacrilegious, is debasing in its tendency,
of course the police power of the State would suppress that
88 because the right to engage in interstate commerce does not authorize any one to violate a state law. This runs ahead of that. Before it is determined that there are bad ones among them, you inspect them for the purpose, that is, under your theory of the law, that those that should not come in shall not be exhibited. Under the one case a party would have a right to the trial by jury; they would pass on the question of fact as to whether the picture was or was not immoral; a judicial tribunal would make the investigation and the penalty would follow, or not, according to the results after an investigation. There just appears to be a question in my mind along here, somewhere, in this, touching this question. But I am going to hear from you after a bit on this revenue or inspection view of the law; that is the principal question in this case, but there is an incidental or side question somewhere in this case.

Mr. DAWSON: I think this, in not a very connected way, outlines our defense. I think I have said, and I wish to say it now, that we contend that the bill does not allege that two dollars is an unreasonable charge for the service, nor are the facts and figures given to Your Honor with sufficient accuracy so that you can determine they are entitled to equitable relief, nor do they allege or show—I doubt very much if they can show—that the money which we pay out of the General Revenue for the administration of this law, and for the general morality of the people, to which uncensored pictures, we think, is a detriment, especially to our young people—and that is set out with a good deal of detail in our answer—and we think, under all the circumstances, they are not entitled to the relief they seek.

89 The COURT: Narrowed down, here is about your question: Are these films the proper and lawful subjects of an inspection tax; if so, as a matter of law, will the Court decree that this is a revenue and not an inspection law? Of course, if moving picture films are proper subjects of state inspection, whether interstate business or local business, the State may inspect and may charge a reasonable inspection fee for the service. Of course, it cannot burden interstate business, either directly or indirectly, for the purpose of enhancing its revenue. So now, unless you gentleman are of the opinion your case is much wider than I have stated, I judge that is your case, and I will hear from you.

Mr. GATTS: If the Court please, in view of the position taken of this matter by Your Honor, it leaves but little for us to present.

The COURT: Well, do you view the scope of the inquiry to be profitable in the end to be wider than I have stated it?

Mr. GATTS: I hardly think so.

The COURT: If so, I will hear from you.

Mr. GATTS: I do not believe we can broaden on it in any way except one or two exceptions, possibly.

The COURT: I know these "Possible ones," as a rule, you are not able to decree anything on.

Mr. GATTS: The possibilities we are going to speak about arise from the question in hand. We do not, in the first place, believe, as stated by the Court, from the nature and description of the
90 films of the picture show business, is a matter that is proper censorship.

The COURT: Wait a minute; there is one other matter I have not inquired about that may be interesting before we get through. What penalties attach to a non-compliance with the provisions of this law.

Mr. DAWSON: Not less than twenty five dollars nor more than one hundred dollars for each offense.

The COURT: And the exhibition of each picture that is not inspected and authorized is a separate offense?

Mr. DAWSON: I think it can be. Now on the information and warrant against Lew Nathanson we only made one count out of the business of exhibiting divers and various and sundry pictures, but in my judgment, if the act is violated, each uncensored picture exhibited constitutes a separate offense.

The COURT: I would think so, proceed.

Mr. GATTS: I believe I stated that we do not think, I believe, under the Constitution of the United States or any State that the matter in hand, towit, picture films, are subject to a censorship law: in the first place, because it is described in our bill, and admitted by the State, the nature of this matter—they are simply reproductions of publications,—Your Honor touched on that—in the final issue of the case.

The COURT: There might be other matters: I suppose they are not limited to that.

91 Mr. GATTS: Well, from the matter in hand they are limited simply to the dramatization of plays, the dramatization of stories, the picturing of great events, to be exhibited on canvas; in other words, the production of them in the first place, or publication, and it is so held by the Supreme Court of the United States in passing on this matter pertaining to copyright of this very matter. They are dramatizations; they are the utterance of sentiment, although in pantomime; the same result is had, do not necessarily have to be spoken from the stage, but even in pantomime they are dramatizations and publications.

Now, it is not alleged in the answer of the State that the business which they undertake to censor, towit, to censor the picture films, it is not alleged they are wrong inter se. In other words, it is nowhere alleged in this case that the matter itself is wrong. So, if the act—if it has any effect, would be striking at a probability, and this would not apply under this legislation.

The attempt of a censorship in this country has long gone by, and the attempt of Kansas to censor free speech—not necessarily

the free press involved in this matter—but the free speech involved—the time to attempt to censor the free speech has gone by since the date of our Constitution. Now, we do not see any room, and none has been shown to us by the pleadings on the part of the State, that this matter is a subject of censorship. We know of no law by which moral conduct could be censorable; we know of no law by which the thoughts of a man could be censored; we know of no law by which a picture drawn could be censored. We concede, however, that a State may pass a law punishing the violation of its State statutes wherever the constitutional limit has been exceeded, either in press or in free speech, if it is violated and becomes a wrong, the State can punish it, but they cannot prevent it, there is no prevention before the determination. So that this act,
92 if it could be legally called a right of censorship, is simply an attempt to censor these matters before it has been judicially determined that there has been any violation of the law in this State. We have furnished, of course, and I will not take the time of the Court to detail it, in our affidavits that will be filed in this matter, the general nature of this business. And the State of Kansas has admitted in its answer that these films are instructive, beneficial and amusing, as well as educational. That is in the answer, they admit all that—that that is the nature, admitted as we plead it, that is the nature of this question—that they are instructive, they are educational, they are amusing. Now we do not see any place where a State can determine before-hand that a matter is going to be a wrong except ab initio it is wrong. I concede the statement made by the Attorney General that if a matter of commerce, any interstate commerce, was of itself wrong, it could be censored and prevented, but where you step over the line and undertake to interfere with interstate commerce, then the limit comes to only one point, and that is, if it could so do, the right of inspection.

The COURT: Allow me to make an inquiry: Has there, as shown by the authorities, ever been an attempt on the part of any State to charge a censorship fee for dramatic productions?

Mr. DAWSON: In the State of Pennsylvania an act was passed about a year ago imposing an inspection fee of two dollars and a half on these moving picture films, but the Attorney General of Pennsylvania tells me that the act has never been put into effect for lack of appropriation to set it going.

93 The COURT: My question is——

Mr. DAWSON: As to dramatizations?

The COURT: And theatrical plays, musical comedies, and such as we have in our play houses.

Mr. DAWSON: I had Judge Lindsay spend considerable time in the State Library and we found nothing of that sort.

The COURT: Found no light on that subject?

Mr. DAWSON: No.

Mr. GATTS: And we have also spent a good deal of time looking for the same proposition, and we found that no where in the United States has there been an act of the legislature passed its object being the censoring of drama, the censoring of publications, the censoring

of musical comedies, the censoring of a speech, the censoring of uttering of sentiments—we find that no state of this Union has ever yet attempted to do that. Now this act is an attempt to censor these matters that we believe are beyond its power; in other words——

The COURT: That comes to my question, as to whether these are the legitimate subjects of state inspection.

Mr. GATTS: They could not be the legitimate subject of state inspection under the interstate commerce law except the original right to censor existing. In other words, as we understand the right of inspection to be, that it can no where be used except where inspection law is being enforced upon a proposition that of itself is wrong or partially wrong.

The COURT: For instance, the State may inspect meat and other food products to see whether they are deleterious to the health
94 or not; they may inspect in the absence, perhaps, of National Pure Food Law, drugs, foods and other matters shipped in interstate commerce, as to their purity, as to their standard; but the question here is not, in my judgment, determined on whether there has to be first a determination that impure foods or drugs are being sent in, but to maintain the standard of purity. So, you cannot base it on the question of prior determination of right or wrong; it has to be in the subject-matter itself.

Mr. GATTS: We concede that, that it must be in the subject matter itself. And yet, in the inspection under the Pure Food Act, the inspection of meats or inspection of importations that come into the State, they are based upon the proposition that there is a wrong to be righted; in other words, that the inspection would serve a purpose, to improve or protect the health of the citizens of the State, or its general welfare; that is as far as they have gone; we find no inspection law that goes beyond that proposition. Now it reaches out, as the attempt in this act does, to censor a matter that is not inherently wrong; what is that standard to be determined, and by whom? Every inspection law of this country where they attempt to inspect these matters of importation, such as cattle and pure food, and all that matter, where that has been attempted it has been an inspection law especially passed for that purpose,—I do not want to reach into the revenue end of it's quite yet—but for that purpose, to inspect these matters that come into the state that might be injurious to the health and welfare of the State.

Now, to go beyond the health and welfare; here is an act that attempts to censor, based upon a proposition that there is a presumption of morals or immorals in it. In other words, it is an act
95 attempting to censor the mind and the expression. It is an act that attempts to define—and vests the power in one man for him to say as a censor in this State—whether or not, in his view of it, it is immoral; he alone must determine that. Now, then, in view of that, this act has its vice even if that could be conceded, and we do not; it has its vice in the fact that it places the power in the State Superintendent of Public Instruction—he must determine these matters under this act—; it is true, as Brother Dawson has said, they provide for some appeal to two or three other

officers of the State. Yet, those three officers are nothing more than censors over the same subject matter. There is no provision of this bill, and I do not know of any under any law,—no provision of this bill by which an appeal may be taken from this censorship act to the Courts of Your State, for the reason that the act itself places judicial power in these officers. It is judicial in its nature because it gives them the power to pass upon the question of immorality, possibly, that might exist, if they found any, in an exhibition brought into the State, they determine that. Their finding is conclusive, and so far as that is concerned, no appeal from it.

Now, if the Court please, it broadens at that point in this: That the act is prohibitive of interstate commerce in this respect: The power being vested under this act in a censor who determines, and who is given power to determine, whether a film that comes into this State—matters not what it cost our complainant, matters not the expense of it in producing, it gives him the right to say, in his own mind pass upon the morality of it, the religion of it, and in his view whether it is immoral, putting his head and his standard above all others, above the producers of this film, giving him the right to say that these films could not enter the State. In other words, gives him the power to prohibit this commerce in his own view of it. It is not like the inspection laws. They let the good go in and the
96 bad go out. But this is a censorship that gives him the power to censor and thereby he can prohibit all films if he sees fit. His judgment could control as to the whole business connected with this picture show business. He can say if he sees fit, depending upon the temper of the man, he can say whether or not this is moral or immoral. And when you reach that question, if Your Honor please, that is one line in the part of censor, when you reach the proposition of censorship over publication, over printing, over speaking, when you reach that, and put the power in a censor, he simply censors his own mind not what the public would think of it, not what some one else opposed to his views thinks of it, not whether or not it would be sacrilegious, but it depends upon his own mind, and it is in his own mind for him to say whether or not it is moral or immoral. Men have different views on all of these matters, and that was the purpose when we broke away from the autocratic old governments, and when the people came over here for a free country, when they broke away from that, that was one of the great guarding principles, and that is why the Constitution was framed upon it, because those men, when they framed that Constitution were fresh from all of these troubles, and therefore when they put this constitutional prohibition over censorship, they knew themselves what it meant, and it has been held inviolate, an attempt has never before been made to censor in this country. It is a step backward, and I can see the impracticability of it, and the impossibility of it, and that, because it is the censoring of the man's own mind.

The COURT: You say there are no authorities anywhere touching this proposition?

Mr. DAWSON: We were not able to find them and we worked with some diligence.

97 Mr. SELIGSBERG: (Calls attention of the court to case of Railway Company v. Brown 80 Kan. 312, reviewing the same to the court, briefly.)

The COURT: Proceed.

Mr. GATTS: On the point Your Honor has suggested, I might read a short opinion from the Supreme Court of California on that matter. I would like to read what the Supreme Court of California has to say.

The COURT: Very well, I am listening.

Mr. GATTS: In the case of Dailey et al. v. Superior Court of the City and County of San Francisco et al., 109 Cal. — 44 Pac. 458, the Supreme Court of California has to say:

"The production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author, and, as to the question here presented for our consideration, it is immaterial whether the words be publicly spoken from the stage or upon the hustings, or go out to the world through the channels of the printing press. By the constitutional provision we are about to invoke, a citizen may speak, write, or publish his sentiments with equal freedom, and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interfere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper. We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this
98 proceeding for such order was an attempted infringement upon rights guaranteed to every citizen by Section 9, Article 1, of the Constitution of this State. That section provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right."

The COURT: The provision in this State reads, as follows:

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

Mr. GATTS: There is about the same provision in all of the States.

The Court then says; speaking of the rights of the citizen:

"He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can

be no responsibility. The purpose of this provision of the Constitution was the abolishment of censorship, and for courts to act as censors is directly violative that purpose."

99 The COURT: Read the title of that bill.

Mr. GATTS: The title is this:

"An act regulating the exhibiting or using of moving picture films or reels; providing and regulating the examination and approval of moving picture films and reels, and fixing penalties for the violation of this act, and making an appropriation for clerical help to carry this act into effect."

Mr. GATTS: I will pass the censorship presentation, Your Honor. The Court stated his views upon the censorship proposition, and I do not know that I can add anything to them.

I would like to call Your Honor's attention to some of the provisions of the bill itself:

In section 2 of the act it says: In addition to the duties now imposed upon the state superintendent of public instruction, it shall be his duty to examine all moving picture films or reels intended for exhibition in this state, and approve such as he shall find to be moral and instructive, and to withhold his approval from such as tend to debase or corrupt the morals. Upon such moving picture films or reels examined by him, and which shall be approved by him, there shall be stamped or written a certificate signed by him, showing that such picture has been examined and approved by him, giving the date of such approval.

SECTION 3. The said superintendent of public instruction shall keep an accurate record of all examinations made by him and the date thereof, and by whom presented for examination, and noting such pictures as shall be approved and such as shall not have been approved, and briefly stating his reasons for withholding his approval of such as are not approved.

100 SECTION 4. For each examination made by said officer he shall receive the sum of two dollars for each moving picture film or reel. No picture film or reel shall be examined until such fee shall have been paid to him, and all such fees shall be paid by him on the last day of each quarter to the State Treasurer.

I want to stop there and say, of course, that would mean and does mean the two dollar taxation is placed upon all films, whether they are proper or improper.

(Continuing to read from the act:)

And by said State Treasurer credited to the general revenue fund; provided, that the treasurer shall issue receipts for such fees in triplicate, one to the state auditor, one to the state superintendent and one to be kept by him and filed in his office. Provided, that for good and sufficient reasons shown, the governor may authorize the employment by the superintendent of public instruction one or more additional clerks in his office as may be necessary, at a per diem not to exceed three dollars per day for each day actually employed, which per diem shall be paid out of the general revenue fund on warrants duly issued and payable in the same manner as other clerks in said office are paid.

In our view of that act, it is purely the revenue act of the State. It no where defines what the expense shall be for the actual cost of the inspection. The inspection law, as we have found it to be, even if this was a subject of inspection, *are* confined absolutely to the reasonable cost of inspection. No State can infringe upon interstate commerce for a greater amount for a revenue and tax except the actual expenses of the inspection itself. Now, I note what the Attorney General said on that subject; that this general revenue fund derived from this inspection bill would be turned into
101 the State Revenue, the general fund, and that out of that general fund the officers of the State were paid for the administration of their different official duties in the State. Now we have, of course, and would be pleased to present a brief on that proposition, that under the guise of inspection a revenue for the state cannot be collected.

The COURT: I do not suppose it will be contended it could.

Mr. GATTS: And further, it cannot be collected and put into the General Revenue fund of the State for the purpose of paying or devoting the money to any other purpose. That is absolutely the law of this country. The right to inspection, like food, meats, etc., where the acts have been sustained by the Supreme Court of the United States, *have* been based upon the actual expense. One state undertook to, for instance, the State of North Carolina——

The COURT: Do you say it has been held that the inspection fee may not be converted into the general revenue fund of the state and from there the cost of the service of inspection paid state officials for such service, if the fee charged does not exceed a reasonable amount? Have the authorities held that?

Mr. GATTS: They have come right up to that point.

The COURT: I do not mean that.

Mr. GATTS: I want to say this about that; that if this act so provided it might support the theory just now suggested by the court, if this act provided that this inspection fee should be used for the paying of the inspection tax, and then making the provision that if a surplus remained it would go to the United States
102 Government, it would be a different thing.

The COURT: Go where?

Mr. GATTS: To the United States Government. We have a late decision that this is the same thing.

The COURT: What business has the United States Government with it?

Mr. GATTS: The Supreme Court decided a short time ago——

The COURT: The Supreme Court of the United States?

Mr. GATTS: Yes, that under Section 10, Article 1 of the Constitution, providing for inspection was the same as interstate commerce. I though- our Brother would say something about it; we didn't believe it ourselves although we put it in our bill. Judge Hughes wrote the opinion a couple of years ago.

Mr. DAWSON: I have suggested in my answer, that if they are able to show that the fee that we do charge exceeds the expense of administering this law, that we will hold the balance subject to

demand of the United States Government, in compliance with the United States Constitution.

The COURT: That is not possible, gentlemen. I have not looked at the authorities, but this is either an inspection fee, it must be a reasonable fee for the service, or it is a tax. Now to say that the State may levy and charge an inspection fee, and if it finds it has charged too much, that it goes to the Government—no, I cannot think of that.

Mr. DAWSON: The Constitution says, "No State shall,
103 without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States."

So I thought while it was novel to me to have him raise that, I would say, if there was any balance we would give it up.

Mr. GATTS: Your Honor asked the question about whether the courts have held that an inspection fee may be charged and placed in the general revenue fund of the state, and out of that the expenses are to be paid. Now we do not believe that is the road it can take, for this reason. That the act itself must in its provisions provide a separate fund; in other words, a fund to be derived from the inspection tax must be in the provisions of the bill. That the inspection tax, as I said before, can only be collected as an inspection fund. In other words, the State cannot speculate upon it, it cannot leave the bill indefinite in any way; that if this inspection tax takes any other course, or goes into any other channel of state revenue, or state charity, as held by this North Carolina case—it cannot go into a charitable fund, it cannot go into any fund except the inspection fund. In other words, that under the constitutional provision giving the right of inspection, conceding this was a matter subject to inspection; that the fund must be so provided that it is determined by the bill, not by the intention of the officers of the state, not by their good intentions as to over-collecting, but that it must provide an inspection fund. This bill provides that this inspection money shall be turned into the general revenue fund of the State. I am not going into what they promised to do, but it
104 only makes one provision as to what shall become of that fund after it reaches the general revenue fund, and that is, that under certain recommendations from the Superintendent of Public Instruction the Governor may employ a few clerks at three dollars per diem to assist in this inspection. There is no provision in the bill for the expenses to be paid to the State Superintendent of Public Instruction; he is a salaried officer of the state; no revenue goes to him.

The COURT: Can he receive a compensation for this service if performed by him aside from his fixed compensation?

Mr. DAWSON: No, Your Honor.

Mr. GATTS: No, Your Honor.

The COURT: Then we cannot charge anything up for his services.

Mr. DAWSON: With the exception that he is paid twenty five

hundred dollars a year for this and other services, for this and other services.

The COURT: So, if he does not perform this, he gets twenty five hundred, and if he does, he gets twenty five hundred.

Mr. DAWSON: If he does not perform this, I throw him out.

Mr. GATTS: But this bill does not provide for any inspection fees proper excepting to the clerks employed by the Superintendent of Public Instruction.

The COURT: Your law goes farther than I thought it did.
105 That if it is an inspection tax, limited to the cost of the service of inspection, that it has to be kept separate from the other fund.

Mr. GATTS: No question about that.

Mr. DAWSON: We dispute that absolutely.

Mr. GATTS: They have found different books from what we have, and all in the same library. In presenting the matter to the court we are not going to read these opinions and take up that time, but it has been decided so often it has become settled in this country, that where the right to inspect exists, it only exists to the actual cost of the inspection.

The COURT: We agree on that proposition.

Mr. GATTS: This bill does not so provide; that is the vice of this act, and if they had the right to censor——

The COURT: The presumption is that is reasonable.

Mr. GATTS: Well, I don't know, and if it is not so presumed then no one could probably determine that except the legislature. But if the Legislature had said that was a reasonable inspection fee and had provided that inspection fee be used for that purpose, then the trouble about this revenue end of this bill would be cured. But whether or not it is a reasonable inspection fee the court cannot determine, or we cannot determine, and no one else can determine except upon the face of the bill. That is what I am getting at. And that is, if the bill itself turns that revenue into any other direction except for the purpose of inspection, that it is a fatality, and
106 the court says it does not matter in what language the bill may be couched, if, as a whole, upon its face, it shows it to be a revenue bill, that is the end of the matter.

The COURT: Yes, that is true.

Mr. GATTS: Now there has been no appropriation provided for. The caption says there was, but there has not been. The caption says, and provision made for an appropriation for carrying out this inspection, but the fact is not such. The title to the act is desultory because it does not provide for it. Then so far as the bill is concerned, it makes no provision. I do not want to repeat myself too often, except to make myself clear about it. It does not provide for actual expenses of inspection for the reason that it does not provide what shall be paid out for inspection. It provides the income from it, but makes no provision as to the out-go of this money. So that a court could not determine even though the legislature may have thought two dollars was a reasonable fee.

The COURT: The general laws of the State provide how money shall get out of the general revenue fund.

Mr. GATTS: That is true of the general revenue fund, but not of the inspection revenue fund. It has never been held, in the United States or any where—it has never been held that an inspection fee can be a revenue fund, except for inspection. So, even if the general revenue fund of your State—by general laws provision is made how expenses may be paid to the officers of your state from this fund, that cannot reach the inspection law, because the inspection law stands on its own feet, and you cannot make it in any terms a general revenue fund.

107 Now, one more question. What would be our remedy for the arbitrary censorship of this business, or wrongful censorship? An official is presumed, as I understand the law, to be —, under the power granted to him and in his official capacity, so that before we would have an action in any form it would have to be shown that the act was malicious and wrong, and especially malicious on the part of the officer, before we had resort to the court. In this matter what would be the question to be determined? It would be a judicial determination upon the censoring of a certain article, towit, these films. Who should determine it if it reached a judicial determination? It is either to be determined by a jury or the judges. Then determine what? Determine whether or not a particular film is immoral, obscene, etc. That brings it back to the first step, that, at least, it depends upon the sentiment of the State and the general view of the public upon all of these matters. There would be no other remedy.

There has been an important opinion on this censorship business, pertaining to the picture shows, and that was the opinion and the veto of Mayor Gaynor of New York on the censorship ordinance passed by the Council of New York, December 27, 1912. It is unnecessary to say who Mayor Gayner of New York is: a Judge there, I believe, whose opinions are regarded as supreme. I would like to take the time of the court to read that, and then I am through on this censorship business. It was the utterances of Mayor Gaynor on this censorship proposition so far as applied to the picture show business.

Mr. DAWSON: On the wisdom of the law.

The COURT: It keeps rising in my mind all the while, the question as to the ingredients of a body of materials, it is a
108 question of scientific investigation and determination of a fact; as to whether butter, meat or any food product is healthful or whether it is decayed or putrid to such an extent as to be injurious to the health, that is an investigation and determination of a scientific fact. As to whether that which is moral or immoral in a printing, or a book or paper, can that be left to any kind of a scientific determination, or must that be inquired into by a judicial tribunal?

If you should go back, I would have thought, into these inspection cases, a close examination should have raised the question that

is troublesome to my mind along this line. Whether there is anything in it or not, I have not investigated.

Mr. DAWSON: I think Your Honor was on the Supreme bench at the time the Mefford case was decided, and you there held that to require this to be done with the formality and scholarship ordinarily brought to a case by Judges, would absolutely vitiate the law relating to the inspection of doctors, and that therefore, of general necessity, and in the administration of business, this had to be left to an administrative tribunal.

The COURT: But still, we were investigating there a scientific accomplishment or fact; it was not a question there as to whether the practice of medicine by a man would be injurious to the morals, but to the health.

Mr. DAWSON: At least you upheld the judgment of an adminisrative board.

The COURT: Perhaps so, but this involved an investigation into the fact of his morality or immorality, and not that allowing
109 a certain man to practice medicine would be injurious to the good morals of the community.

Mr. DAWSON: Now, in that act, it provided for no appeal, yet you granted an appeal and did review the case the same as if that statute——

The COURT: I am not speaking of that. Proceed.

Mr. GATTS: You mentioned a proposition that I intended to mention, but you saved me the trouble, and that is this: Under all the inspection laws we have examined, the subject to be inspected was subject to chemical analysis, and subject to the chemical discovery of matters which might become deleterious to the public health, and therefore deleterious to the general public. And there is not an inspection law in the books of the United States that has been before the courts except based upon cases where there is a right and a way of discovering the impurity or the improper state, or improper adulteration of foods &c.; all acts would put it upon the way in which that inspection could be made to determine it. As I said a moment ago, the censorship law, there is no way chemically, no way analytically, and no way except in the varied minds the Good Lord has given to everybody to determine a matter upon which he may think, and we do not all think alike; there is no way to determine, not in this case.

We would further present our view by reading from the opinion of Mayor Gaynor to the Board of Alderman on the Picture Ordinance, and it will only take a moment to tell what Mayor Gaynor said:

"To the Honorable the Board of Aldermen:

GENTLEMEN: I return disapproved the proposed ordinance, No. 89, entitled:
110 "An ordinance relative to motion picture theatres."

"I am constrained to do this because of the provisions therein creating a censorship. It is provided that the Board of Education shall appoint one or more censors to examine all motion pic-

tures in advance and determine whether they shall be exhibited or not.

"It has hitherto been the understanding in this country that no censorship can be established by law to decide in advance what may or may not be lawfully printed or published. Ours is a government of free speech and a free press. That is the cornerstone of free government. The phrase "the press" includes all methods of expression by writing or pictures. In past ages there were censorships to decide what might be published, or even believed. Every christian denomination has at one time or another been subjected to such censorship. The few were very anxious not to give freedom of speech or of the press. They thought the many were not fit for it. They therefore set themselves up as censors and guardians over the bulk of their fellowmen. The center of thought was then among the few, and they were very anxious to keep it there, but in the course of time, in spite of all opposition, the center of thought began to pass from the few to the many, where it is to-day. It was then that censorships, and all interference with freedom of speech, of the press and of opinion, began to give way by degrees, until in the end all of them, at all events, eventually were abolished. And that is now substantially true under all free governments throughout the world.

"In our fundamental instruments of government in this country, which we call constitution-, we expressly guaranteed from the beginning free speech and a free press, and prohibited the passing of any law abridging the same. The provision in the Constitu-
111 tion of this State on that — substantially the same as the like provision in the Constitution of the United States, and also of the States generally, — is as follows:

"Every citizen may freely speak, write, and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

So universal has been the opinion that these constitutional provisions abolished all censorship of the press, and forbade them in the future, that I have been able to find only one attempt in this country to set up such a censorship before this one of yours. Our constitutional provision plainly is that publications whether oral, or printed, or by writing, or by pictures, shall not be restrained in advance, but that every one shall be free to speak or publish what he sees fit, subject to being prosecuted afterwards for libel, immorality, obscenity or indecency therefore. There seem to be a few among us who wish us to retrace our steps, and resort to censorship again in advance of publication, and make it a crime to publish anything not permitted in advance by the censor. Do they know what they are doing? Do they know anything of the history and literature of the subject? Do they know that the censorships of past ages did immeasurably more harm than good? Do they ever stop to think that such censorships now would do even more harm than they did in past ages, in comparison with what little good they might possibly do? I do not believe the people of this country are ready to permit

any censor to decide in advance what may be published for them to read or what pictures may be exhibited to them. Our laws forbid the publication of any libelous, obscene, indecent, immoral or impure literature or reading matter. Is not that enough? If any one does this he commits a criminal offense and may be punished therefor.

112 "If this ordinance be legal, then a similar ordinance in respect of the newspapers and theaters generally would be legal. Are you of opinion that you have any such power as that? If so, you should probably begin with the newspapers and the so-called high class theaters. Once revive the censorship and there is no telling how far we may carry it. These moving picture shows are attended by the great bulk of the people, many of whom cannot afford to pay the prices charged by the theaters. They are a solace and an education to them. Why are we singling out these people as subjects necessary to be protected by a censorship? Are they any more in need of protection by censorship than the rest of the community? That was once the view which prevailed in government, and there are some among us, ignorant of or untaught by past ages, who are of that view now. Are they better than the rest of us, or worse?

"The truth is that the good, moral people who go to these moving picture shows, and very often bring their children with them would not tolerate the exhibition of obscene or immoral pictures there. A place in which such pictures were exhibited would soon be without sufficient patrons to support it. At all events the criminal law is ample to prevent the exhibition of such pictures. I have asked these people — are crying out against the moving picture shows to give us an instance of an obscene or immoral picture being shown in them, so that the exhibitor may be prosecuted, but they have been unable to do so. What they insist on is to have the pictures examined in advance, and allow or prohibit. That is what they are still doing in Russia with pictures and with reading matter generally. Do they really want us to recur to that system"?

I think Mayor Gaynor covered the subject pretty thoroughly. I do not know but what there are penal statutes in this State that

113 would reach out and punish exhibitors of immoral pictures.

I want to speak of a matter that Your Honor mentioned, and that is this: Of course, when Kansas went into the Union, you might say she went in a little more than she had a right; she took jurisdiction of all the military laws, and finally gave it back to the Government. Kansas is always progressive. Now she gave up the right of interstate commerce to Congress. It is fundamental, if Your Honor please, that where the Congress has legislated upon a matter of commerce between the States that the State can pass no law in conflict with that act. She surrendered that right. Now, over this matter, Congress passed the bill pertaining to the transmission through the mails—Your Honor spoke of that—of obscene pictures, of obscene letters, or anything that is of an immoral nature, put a heavy penalty, up to five years in the penitentiary for so doing. Recently Congress went further than that in this same field. Passed

an act similar to the postoffice act, making it a similar offense to send by express immoral pictures, or send matters that this bill attempts to strike at, and added heavy penalties should they be sent into the States by the express companies, Congress has covered this field, in our view of it, in so far as a shipping from one state to another is concerned, — as it can be done. This State, I would conceive, might punish, could punish, the exhibition of immoral pictures, they can do that; and they can punish the picture men of this State for exhibiting such class of matter; but when they put this tax—it is a tax—upon this interstate commerce, the tax directly applies from the manufacturer down to our client, because it puts a burden on this business by this taxation, necessarily abridging commerce, necessarily burdening commerce, because it does not stand open to argument, that if you tax a matter you necessarily reduce its value; necessarily makes our business less valuable, be-
114 cause it would not take argument, that if this bill was in operation and they undertake to tax Mr. Nathanson, or any other picture show man in the State two dollars for every film, he would come right back and say to the plaintiff, pay this license fee or we will take it out of your rent. I do not agree with Brother Dawson that we are not interested, we are directly interested.

Well, to sum it all up, we think the matter suggested by the Court, first, whether or not it is a subject of censorship, if not, the whole thing falls, the whole act. If it is a subject of censorship or licensed inspection, then the act would come up for construction. Then, if we pass the first point, that you cannot censor a man's mind, pass that point, and come up to this act, then the only right which exists is for inspection, and the bill on its face must show that the money collected is for that especial purpose and cannot be used for any other.

115 Mr. DAWSON: I will take but very little of Your Honor's time. I am glad that the proposition has narrowed down to the two points which Your Honor has named. First, is this a valid exercise of the police power of the State for inspection; and second, is the inspection fee a reasonable one.

Now my friend here seems to think that we have not sufficiently traversed in the bill, or set out in our answer, I should say, that uncensored pictures are hurtful. I do not remember just how he raised the point, but the answer is, I think, to point out what we briefly say on page ten of our answer, that the act is in good faith an exercise of its police powers for the protection of its public morals. That the moving picture theaters of the State of Kansas are largely patronized by the children of the State of Kansas with minds unformed and that the development of the moving picture theater business in the State of Kansas, although of recent origin, has made, in the unimpeachable judgment of the Legislature, the necessity for the act in controversy. And later, as we set out and say: The State of Kansas expends many millions of dollars each year for the proper education of its children and to nurture them into proper, wholesome and moral citizenship and that out of the general revenue fund of the State of Kansas, by direct appropriations, are expended over two millions of

dollars per annum in behalf of such education besides untold millions which are contributed by the various counties, cities and other subdivisions of the State in behalf of education and moral training in citizenship. And that in addition thereto large but indefinite amounts are expended by private, religious and moral associations and organizations, all seeking the same general end—education and moral training for the young citizenship of the State of Kansas. And the Legislature, in its unimpeachable wisdom, believed that uncensored pictures were detrimental to the morals and perversive of true education.

116 Now I feel pretty well satisfied that is a broad enough allegation to meet the point which my friend raised.

Now, in regard to the manner of review. There is no review provided by the terms of the act, which has to be read in connection with the other laws of the state, has to be read as other laws of a similar import are read and administered and interpreted by the courts. Practically all inspection business, of whatever nature, by either State or National Government, is made by administrative officers and not by a judicial officer. The inspection of live stock by both the State and National Governments, the inspection of grains, of food stuffs, of food and drugs, all made by an administrative officer, not by a judicial officer. The granting of certificates to men to practice medicine, to teach in our public schools, and barbers are now inspected, local engineers, stationery engineers, all must have a license to show their competency in many states. Even the lawyers themselves have to show their qualifications and fitness to an administrative board; druggists likewise, and so on. Now, then, is there no review of the judgment of these administrative officers and bureaus? There is by the laws of the State of Kansas. Perhaps, I think so, by the general proposition that every man is entitled to his day in court.

Now, then, in the Mefford case, this man's certificate to practice was revoked by the administrative board on account of immorality. The statute did not provide an appeal but he did appeal, and I think it was perhaps by mandamus, to compel the board to grant him a license. I do not remember exactly how that came up, but, in any event, the court did review his cause just the same as if the statute had provided a method of procedure. And for this particular kind of business, now what might a statute have provided that would have been of any service, to the complainant that he has not

117 under general principles of law? If the picture is not objectionable it must be approved. And if it is disproved, mandamus will compel it to be approved unless it is obscene, indecent, immoral or sacrilegious, and that would be determined by a court and adequate damages awarded. We set that out in our answer and Your Honor is familiar with it as a principle of law.

Now, in regard to the freedom of speech and of the press, it has been with some difficulty that I have been able to get the theory of counsel on that subject. Now, it is true, there are no cases of censorship that we have been able to find, except the slight analogy that has been made of this California case, and that I do not think will help Your Honor much.

The COURT: Let me ask you a question and see if it will throw any light on it.

Suppose a moving picture film thrown on a screen should say of yourself, or any other good citizen, that you had committed a certain crime; what would your cause of action against the person who caused that to be done, or who did it, be?

Mr. DAWSON: I think it would be a civil action of libel.

The COURT: Then this after all, this moving picture business, is the business of publications?

Mr. DAWSON: It is in part, but now here, we prosecuted men for indecent conduct; now if a man keeps that up certainly we would not hesitate to enjoin him; now then if the indecent conduct is reproduced in a picture, it seems to me the hands of the public would not be stayed there.

The COURT: I do not mean that at all; but the thing in
118 my mind is, not that you cannot punish, but can you say to any one who is going into the publication business, before you publish what you expect to come before the public you must submit it to a board appointed by the State that it may be determined in advance whether you may proceed or not?

Mr. DAWSON: I would say this, as it occurs to me now, that if there was nothing in the moving picture except matters which are publications—even that would be publications—that probably we would be sewed up. But, yet, I point out to Your Honor this, and in my brief, that all the cases which hold that a libel cannot be restrained, depends upon the fact that an individual was the plaintiff and not the public was the plaintiff. This matter of free speech and free press has had many historical cases, and as I recall it in my study of history, it was to correct the abuses that had theretofore existed that a man could not speak his mind or write his sentiments concerning matters of politics. Then there was no occasion for anything else, that was the vice aimed at, and if here and there we have gone afield from the original corrective of an old wrong, there is no use of going further. I would undertake to say that if it had not been for the fact that men have been punished and oppressed because they wrote or spoke their sentiments concerning government and politics, that it never would have occurred to our Constitutional framers to fortify against that. But it is a curious thing that this old oppression against free speech and free press, which was aimed at political matters, should now in the opening years of the Twentieth Century be raised up to stay the hands of a State from exercising what seems to be a fair supervision of the public morals, especially so far as children are concerned. Now here are moving pic-
tures; it was never a matter of great consequence until the
119 moving picture business came along; and why? Because the old theaters were expensive and the majority of children did not attend. Now, at the five cent price all of the children go, no child who does not like to go. And the mere fact that we might have a criminal statute to punish a man who would exhibit an improper picture to children, it gives no adequate remedy, gives no

complete protection, gives no adequate exercise of the police power of the State in behalf of the protection of these youngsters.

The COURT: Wait a minute: Suppose that I should deliberately propose to set up and publish that the Christian religion was unsound; that the Bible was a myth: that there was no such thing as a superhuman power; now all of these, to my mind, are very bad; suppose I should engage in the business of publishing my views by pictures and talks in every town of this State, to all who might come to listen about them; children and anybody; can the State stop me?

Mr. DAWSON: It could not on religious matter because our Constitution absolutely prohibits it.

The COURT: If you find his a sacrilege, you fire it out?

Mr. DAWSON: That is right, on sacrilege that is so.

Mr. GATTS: Would depend on the Church.

The COURT: No. The trouble is, publications, of course, when they publish a matter, by the use of written language, you may publish it by pictures, you may publish it by scenes, but, after all, it all falls under the general class of publications. Now, I am just
120 wondering, of course, how far this is going.

Mr. DAWSON: I must say, under the point Your Honor makes in regard to sacrilege that the law might be bad.

The COURT: Suppose you should consider the right of the censor to reject the picture because it is immoral?

Mr. DAWSON: I come right back strong—It seems to me it must be an improper interpretation which leaves the freedom, the unbridled license of exhibiting obscene pictures. Just put it on that ground.

The COURT: I would go a long ways with you in saying the people have carried this freedom of the press beyond what was ever intended, and into more of a license, but my trouble has always been whether they were not protected in it if they did. Now, for instance, ofttimes publications are protected under the freedom of the press when all that is being done is using that as a shield to license themselves to destroy reputation.

Mr. DAWSON: That is very true, and yet, Your Honor, as philosophers we will have to say, that perhaps those wrongs and oppressions that admittedly exist, not less than in Russia and Portugal, are lessened by this means.

The COURT: I was going to go to this question: If the censor here, the Superintendent of Public Instruction, finds that this picture is immoral in its tendency, teaches immorality exclusively, and it being sacrilegious he excludes it; now, suppose it is conceded they did not have the right to put into the law the sacrilegious feature: this law then would have to be bad as a whole, because he must follow the law or not.

121 Mr. DAWSON: I do not think the whole law would be bad merely because the right to exhibit the picture could not be denied as a sacrilege. There is a full, valid, existing law, and the unconstitutional matter,—now assuming the question of sacrilege must be disposed of that way—then we have a fair working statute which can be made operative even if a picture could not be disap-

proved or rejected on account of it being sacrilegious, obscene, immoral and tending to corrupt the morals. Now those are the matters that are the serious ones in a country which absolutely guarantees religious freedom, even to the extent of sacrilege.

The COURT: Do you think the Legislature would have voted to pass this bill if you left out the word "sacrilegious"?

Mr. DAWSON: Without question.

The COURT: How can you tell: it may have been they were a proselyting lot of gentlemen and that was what they intended to protect.

The question is, would the legislature have passed it if that word had been omitted.

Mr. DAWSON: Senator Brewster suggests they would have passed it without anything except the title.

The COURT: I will say to you General, I am not going to pass on this matter now. I want all the help in this case you gentlemen can furnish me, and it is a matter of sufficient importance to put some work on it; it is a very interesting question to the court.

Mr. DAWSON: We will be able to do that, Your Honor,
122 better now since you have pointed out to my satisfaction these are the two controlling points of the case. But I shall contend it is a matter of no consequence in regard to the bookkeeping of the State or where this money goes for the time being. No one knows better than Your Honor that equity will follow that money, and it is no matter what the methods of bookkeeping may be. But so long as they are unable to show that the cost of administration, or that the revenues exceed the cost of administration, that they cannot be heard to complain about the size of this fee, &c., &c., &c.

The COURT: I indicated very strongly that was my view, but the gentlemen tell me they will produce on the other side authorities that an inspection fee charged must go into an inspection fund, and that it cannot go into the general revenue. Now, I want you to answer, not their argument, but their authorities if they are produced. I did not mean to stop you, General.

Mr. DAWSON: I think we have the issues in such shape now so we can brief it a good deal better that if we had not had this argument here. While we have waived the formalities in regard to these affidavits, they were not taken by deposition or testimony in open court—they have not yet been formally offered in evidence, but if they are so tendered and considered as being in evidence, I wish Your Honor to allow us, and let the record show that we are objecting to them as incompetent, irrelevant and immaterial.

The COURT: I cannot do that.

Mr. DAWSON: But not on the ground or the fact that it appears in the form of affidavits.

123 The COURT: No, because that goes to the competency of the evidence itself; because, on a final hearing, like this, affidavits are incompetent evidence. Now if you object to their materiality and irrelevancy, all right.

Mr. DAWSON: I will put it on the ground I object to the evidence on the ground of its irrelevancy and that it is immaterial, and

that it is not responsive to the issues involved in the suit, and to the contents of the testimony as incompetent, if that may be allowed; the contents of the testimony.

Mr. BREWSTER: On the proposition that the depositions themselves, as depositions, the matter contained in them is incompetent to prove——

The COURT: I apprehend the question of competency relates entirely to the right of the person giving the evidence to speak at all, and to the manner in which he speaks it to the court.

Mr. BREWSTER: I think there is some evidence that the witness is competent to testify about, but the matter he is testifying to is not competent to prove the issues, as it might be hearsay testimony, it might be conclusions the material thing he is testifying to probably before the court would be competent.

The COURT: Then the objection would not be to its competency, but that it is hearsay, that it is not the best evidence.

Mr. DAWSON: I object also for the reason it is incompetent and hearsay and a conclusion of the witness.

The COURT: Now the affidavits are offered and received in evidence.

124 Mr. DAWSON: Now I would like to inquire whether these objections will be considered as being in writing, being that it will be set out in the record.

The COURT: Yes.

Mr. DAWSON: There is one other matter I wish to ask, and that is that Your Honor direct the complainant in re-writing his bill to number his paragraphs, we found a good deal of difficulty in answering it.

The COURT: That is always better.

Mr. DAWSON: We would like also to have a copy of the bill, the bill and answer being filed of this day, and like to have the record show the court, upon agreement of parties, ordered that the stenographer's fees be paid one-half each, the prevailing party to recover the amount paid as a part of their costs.

The COURT: Before we have anything done here today, this being a court of equity and not a court of record, you must prepare your order, and I will sign it; prepare your order of submission of the case; include in that the leave I have given to amend the bill, and to file an answer to the amended Bill, and order of submission, and take in that order such time to lodge briefs in the matter as you gentlemen can agree upon. I would like for you to get them in at as early a date as you can, but I do not want you to lessen your efforts to present everything there is on the subject by shortening the time.

Mr. BATAVIA: We have already exchanged briefs, if the Court please.

125 The COURT: It would not be a bad plan, gentlemen, as much as there is involved in this controversy, that you should print your briefs. The State can easily do that, and the complainant is much interested. They are more convenient for

reference, and they are a little more impressive in that form than merely typewritten.

You gentlemen before you leave will prepare the order of submission, including these matters that have been ordered here to-day.

These briefs, let them be lodged with the Clerk, and the papers and briefs in the case will come to me from the Clerk at the expiration of the time determined upon in your order of submission.

COUNSEL: At what time do you want those briefs?

The COURT: I want you folks to agree to that in the order.

(4:30 P. M. recess of Court.)

Indorsed: #11 N. Transcript of Proceedings. Filed July 3, 1914. Morton Albaugh, Clerk.

126 In the District Court of the United States for the District of Kansas, First Div'n.

No. 11-N: Equity.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants.

Decree and Order.

The above entitled cause, having been submitted to the Court upon the issues presented by the Amended Bill of Complaint of said Complainant, and the Amended Answer of the said Defendants, and upon the affidavits and evidence introduced, and upon the statements and arguments of counsel upon the issues and facts in the case; and,

The Court finding that the Bill of Complaint is one in Equity, by way of Injunction, restraining and enjoining the defendants from enforcing an Act of the Legislature of the State of Kansas, providing for the taxing, licensing and censoring of moving-picture films or reels to be exhibited in the said State of Kansas:

The Court finds, and so decreed, that there is no equity in the said Amended Bill of Complaint, so filed, and therefore dismisses said Bill. To which order and decree complainant excepted and excepts.

The Court orders that an appeal is hereby allowed to the Complainant herein, to the Supreme Court of the United States.

127 The Court further orders that, under the provisions of the stipulation filed herein by the respective parties, concerning the provisions of the appeal herein, that the temporary restraining order, heretofore invoked against the defendants herein, restraining them from the enforcing of said Legislative Act of the State of Kansas, be, and the same is hereby continued in force until the final determination of the appeal herein.

The Court further orders that, under the provisions of said stipu-

lation, and the other orders of the court herein, an appeal or supersedeas bond is required of the Complainant, appellant herein, conditioned as by law provided in the penal sum of Five Thousand Dollars to be approved by the court or clerk.

The Court further orders that the stenographer's report of the proceedings in this cause, as reported on May 14, 1913 (which stenographer was agreed upon by and between the respective counsel hereto) shall be, and is made the official report of the proceedings in this cause.

Done this June 25th, 1914, at Kansas City, Kansas.

JOHN C. POLLOCK, *Judge.*

Indorsed: #11-N. Decree. Filed July 3, 1914. Morton Albaugh, Clerk.

128 In the District Court of the United States within and for the District of Kansas, First Division.

In Equity. No. 11N.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants.

Petition for Appeal.

Now comes Complainant in the above entitled case, and petitions the court to grant an appeal from the orders and decree entered herein, of and as of June 25, 1914, to the Supreme Court of the United States.

It presents herewith, as part hereof, its Assignment of Errors, Appeal Bond, and Citation, all of which are hereto attached.

THOS. F. GATTS,
EUGENE BATAVIA,
Solicitors for Complainant.

WALTER N. SELIGSBERG,
Of Counsel.

Allowed this July 3rd, 1914.

JOHN C. POLLOCK, *Judge.*

Indorsed: #11N. Petition for Appeal. Filed July 3, 1914. Morton Albaugh, Clerk.

129 In the District Court of the United States within and for the District of Kansas, First Division.

In Equity. No. 11N.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,
vs.
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants.

Assignment of Errors.

Now comes Complainant and respectfully shows the Court erred in entering its decree and orders of and as of June 25, 1914, in these respects:

I.

The Court erred in decreeing and ordering that there is no equity in the said Amended Bill of Complaint filed herein, and in dismissing the same therefor.

II.

The Court erred in refusing to order and decree a permanent injunction as prayed for in said Amended Bill of Complaint, restraining and enjoining the said defendants therein from enforcing the provisions of the said Legislative Act of the State of Kansas set out, pleaded and made a part of said Amended Bill of Complaint, for the following reasons:

(*a*) Said Legislative Act in question is unconstitutional, being in conflict with and in violation of the Constitution of the United States, as well as the Constitution of the State of Kansas.

130 (*b*) Said Legislative Act in question is in violation of Section 10, Article I of the Constitution of the United States, in that no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, for the reason that a tax (called "fee") is provided for and levied by said Act in question upon imports of motion picture films into the State of Kansas, for the benefit of the General Revenue Fund of the State of Kansas, and not for the necessary inspection cost of said films.

(*c*) Said Legislative Act in question is in violation of Section 8, Article I of the Constitution of the United States, in that it is a tax upon inter-state commerce, and the commerce between citizens of different states, being a revenue measure, for the benefit of the general revenue fund of the State of Kansas, under the guise of an inspection tax.

(*d*) Said Legislative Act in question is an attempt to prohibit by inspection and censorship the importation of a legitimate article of commerce into the State of Kansas, which article intrinsically is not a matter subject to inspection or censorship.

(e) Said Legislative Act in question is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of other states in transacting legal and lawful business with the citizens of the State of Kansas, and deprives the complainant of its property without due process of law, for the reason that said Legislative Act provides it to be "the duty of every person, firm or corporation, intending to sell, rent or exhibit any moving picture film or reel" within the State of Kansas, to present the same to the
131 Superintendent of Public Instruction, to be inspected and censored by him for a tax (called "fee") of $2.00 for each film so presented, said "fee" to be paid into the General Revenue Fund of the State of Kansas; and thereby said Legislative Act imposes a tax, assessment, servitude and burden upon complainant's property, for the benefit of the General Revenue Fund of the State of Kansas, but makes no provision for a mode of confirming, or contesting the decision of the censor or the tax thus imposed, in the ordinary Courts of Justice.

III.

The Court erred in decreeing and ordering that there is no Equity in said Amended Bill of Complaint filed herein, and in dismissing the same therefor; and further erred in refusing to order and decree a permanent injunction, as prayed for in said Amended Bill of Complaint, restraining and enjoining said defendants therein from enforcing the provisions of the said Legislative Act of the State of Kansas, set out, pleaded and made a part of said Amended Bill of Complaint, for the following reasons:

Said Legislative Act in question is one of censorship and is in violation of the Constitutional guarantees of the freedom of speech and of the press, so provided, for by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides: "That no State shall make or enforce any law which shall abridge the privilege- or immunities of citizens of the United States," and Section 11 of the Bill of Rights of the Constitution of the State of Kansas, which provides that: "The Liberty of the Press shall be inviolate: and all persons may freely speak, write, or publish
132 their sentiments on all subjects, being responsible for the abuse of such rights."

THOS. F. GATTS,
EUGENE BATAVIA,
Solicitors for Complainant.

WALTER N. SELIGSBERG,
Of Counsel.

Indorsed: #11 N. Assignment of Errors. Filed July 3, 1914. Morton Albaugh, Clerk.

133 In the District Court of the United States within and for the District of Kansas, First Division.

THE MUTUAL FILM CORPORATION OF MISSOURI, Complainant,
vs.
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John D. Dawson, Attorney General, and W. B. Ross, State Superintendent of Public Instruction, of the State of Kansas, Defendants.

Stipulation and Agreement for the Removal of the Above Entitled Cause from the District Court of the United States, First Division of Kansas, to the Supreme Court of the United States.

Whereas, a bill in equity by way of injunction is now pending before Honorable John C. Pollock, Judge of the District Court of United States for the District of Kansas in the First Division in the above entitled cause.

In view of the fact that the constitutionality of a certain act passed by the legislature of the State of Kansas concerning the licensing and censoring of moving pictures to be exhibited in the State of Kansas and further that the constitutionality of said act both under the constitution of the State of Kansas and the constitution of the United States is made the main issue to be determined under the bill of complaint and pleadings so filed in the above entitled cause.

And in view of the further fact of the great public questions involved in this action and of the further fact that other cases involving like questions have been appealed to the Supreme Court of the United States from the State of Ohio and Illinois and in view of the fact further that the questions practically involved in the
134 other cases that have gone to the Supreme Court of the United States are the same as in this action, all of said cases having been certified and appealed from the District Court of the United States from the other States, and this case like unto them involves the constitutionality under the Federal constitution the same as the Kansas act involved.

It is therefore stipulated and agreed between the solicitors for the complainant herein and John S. Dawson, Attorney General of the State of Kansas, representing the defendants that the above entitled cause by transcript from the Clerk of the District Court of the United States within and for the District of Kansas, First Division, by the consent of the Honorable John C. Pollock, Judge of said Court, the same may be removed and transmitted to the Supreme Court of the United States and there, by the consent of such Court, this cause will be submitted and the questions therein involved along with the other cases involving the same questions to be determined by said Court.

It is further stipulated that the expense of the making and the filing of the said transcript in this case and other expenses of filing

in the Supreme Court of the United States shall be first paid and borne by the complainant in this action, the final costs and expenses however of this litigation upon its determination shall be borne and paid by the losing party.

The right of appearance and the briefing that may be filed in this action in the Supreme Court of the United States, is hereby reserved to the respective parties.

It is further stipulated that this cause shall be transmitted and filed with the Clerk of the Supreme Court of United States, with all practical speed and without unnecessary delay.

135 It is further stipulated that this stipulation shall be filed with the Clerk of the District Court of United States for the District of Kansas in the First Division and that the same shall become and form a part of the record certified up to said court.

Witness our signatures this 16th day of June, 1914.

EUGENE BATAVIA AND
THOS F. GATTS,
Solicitors for Complainant.

WALTER N. SELIGSBERG,
Of Counsel.

JOHN S. DAWSON,
Attorney General, Solicitor for Defendants.

Indorsed: #11-N. Stipulation and Agreement. Filed July 3, 1914. Morton Albaugh, Clerk.

136 In the District Court of the United States within and for the District of Kansas, First Division.

In Equity. No. 11 N.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,
vs.
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction, of the State of Kansas, Defendants.

Order.

This cause coming on for hearing, this 3rd day of July, 1914, on the Petition of Complainant for an appeal from the orders of, and as of June 25, 1914, said appeal is now allowed, appeal bond approved, and citation signed.

JOHN C. POLLOCK, *Judge.*

Indorsed: # 11 N. Order allowing appeal. Filed July 3, 1914. Morton Albaugh, Clerk.

137 In the District Court of the United States within and for the District of Kansas, First Division.

In Equity. No. 11 N.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,
vs.
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction, of the State of Kansas, Defendants.

Bond.

Know all men by these presents:

That the Mutual Film Corporation, of Missouri, as principal, and National Surety Company of New York, as Surety, are held and firmly bound unto the above named defendants, in the full and just sum of Five Thousand Dollars ($5,000.00), to be paid to said defendants, their successors, heirs, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally by these presents.

Dated this 30th day of June, 1914.

Whereas lately, at the January, 1914, term of the above named court, in the above entitled cause, an order and a decree, dated June 25, 1914, were rendered against said complainant, which has obtained an appeal to reverse the action of the Court in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear in the Supreme Court of the United States, at the City of Washington, District of Co-
138 lumbia thirty (30) days from and after the date of the said citation.

Now, the condition of the above obligation is such that if the said appellant and complainant above named, shall prosecute said appeal to effect and answer all damages and costs, if it fail to make good its appeal, then the above obligation to be void; otherwise, to remain in full force and virtue.

[Seal of Mutual Film Corporation of Missouri.]

MUTUAL FILM CORPORATION OF MISSOURI,
By L. THOMAS, *Treasurer.*

[Seal of National Surety Company.]

NATIONAL SURETY COMPANY,
By LEONARD DAMMANN, *Vice President.*

Attest:

W. I. HAWKS,
Assistant Secretary.

The above bond is hereby approved, and ordered to be filed and made a part of the record, this 3rd day of July, 1914.

JOHN C. POLLOCK,
District Judge.

Indorsed: #11N. Bond on Appeal. Filed July 3, 1914. Morton Albaugh, Clerk.

139 In the District Court of the United States within and for the District of Kansas, First Division.

In Equity. No. 11 N.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction, of the State of Kansas, Defendants.

Precipe for Transcript.

To Morton Albaugh, Clerk of the above mentioned court:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the Supreme Court of the United States, under the appeal heretofore perfected to said Court, and include in said transcript the following proceedings and papers on file, to-wit:

Amended Bill of Complaint, filed as of May 14, 1913, together with Exhibits attached thereto;

Amended answer of defendants, filed as of May 14, 1913;

Affidavit of Lew S. Nathanson, filed May 14, 1913;

Affidavit of Patrick J. Hall, filed May 14, 1913, except exhibits A, B, C, D, & E filed therewith; the originals to be forwarded with the transcript as required by Order of July 7, 1914.

Order of the Court, filed and entered May 14, 1913;

Record of proceedings had before the Court, the Hon. John C. Pollock, Judge in the above entitled cause, as transcribed by Miss La Bar, the stenographer agreed upon, of date May 14, 1913, filed July 3rd, 1914;

The order and decree of the Court, of June 25, 1914, filed July 3, 1914;

140 Stipulation and agreement, of date June 16, 1914, filed July 3, 1914, between Solicitors for Complainant, Eugene Batavia and Thomas F. Gatts, and Solicitor for Defendants, John S. Dawson, Attorney General;

Petition for appeal. Order allowing Appeal. Assignment of Errors, appeal bond and citation.

Order of July 7, 1914, directing transmittal of original Exhibits "A," "B," "C," "D" & "E" filed with Affidavit of Patrick J. Hall.

Said transcript to be prepared as required by law, and the rules of this Court, and the rules of the Supreme Court of the United States, and on file in the office of the Clerk of the said Supreme Court of the United States, in the City of Washington, D. C., on or before thirty (30) days from July 3, 1914, the date of the Citation.

THOS. F. GATTS,
EUGENE BATAVIA,
Solicitors for Complainant.

WALTER N. SELIGSBERG,
Of Counsel.

Due service of the above Præcipe for Transcript acknowledged this 7th day of July, 1914, and adopted as ours also.

JOHN S. DAWSON,
Attorney General, State of Kansas;
FRANK P. LINDSAY,
Solicitors for Defendants.

Indorsed: In Equity, No. 11 N. In the District Court of the United States, within and for the District of Kansas, First Div'n. Mutual Film Corporation of Missouri, Complainant vs. George H. Hodges, Governor, Charles H. Sessions, Secretary of State, John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants. Præcipe for Transcript. Filed July 7, 1914, Morton Albaugh, Clerk. Eugene Batavia, Thos. F. Gatts, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

141 In the District Court of the United States within and for the District of Kansas, First Division.

In Equity. No. 11 N.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant,
vs.
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction, of the State of Kansas, Defendants.

Order.

Now, on application of the Complainant herein—

It is ordered that the Clerk of this Court, upon the appeal of said cause, transmit to the Clerk of the Supreme Court of the United States the original Exhibits "A," "B," "C," "D" and "E" filed with and made a part of the affidavit of Patrick J. Hall, filed herein, and that the said Supreme Court of the United States may have said Exhibits for examination and inspection, in connection with the

appeal herein taken, to be returned to the Clerk of this Court upon the final determination of said appeal.

Dated this 7th day of July, A. D. 1914.

JOHN C. POLLOCK, *Judge.*

Indorsed: No. 11 N. In Equity. In the District Court of the United States, within and for the District of Kansas, First Div'n. Mutual Film Corporation of Missouri, Complainant vs. George H. Hodges, Governor; Charles H. Sessions, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants. Order. Filed July 7, 1914, Morton Albaugh, Clerk. Eugene Batavia, Thos. F. Gatts, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

142 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Morton Albaugh, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be true, full and correct copies of so much of the record and proceedings in Case No. 11-N, entitled Mutual Film Corporation of Missouri vs. George H. Hodges, Governor; et al., in said Court, as is called for by the præcipe filed herein.

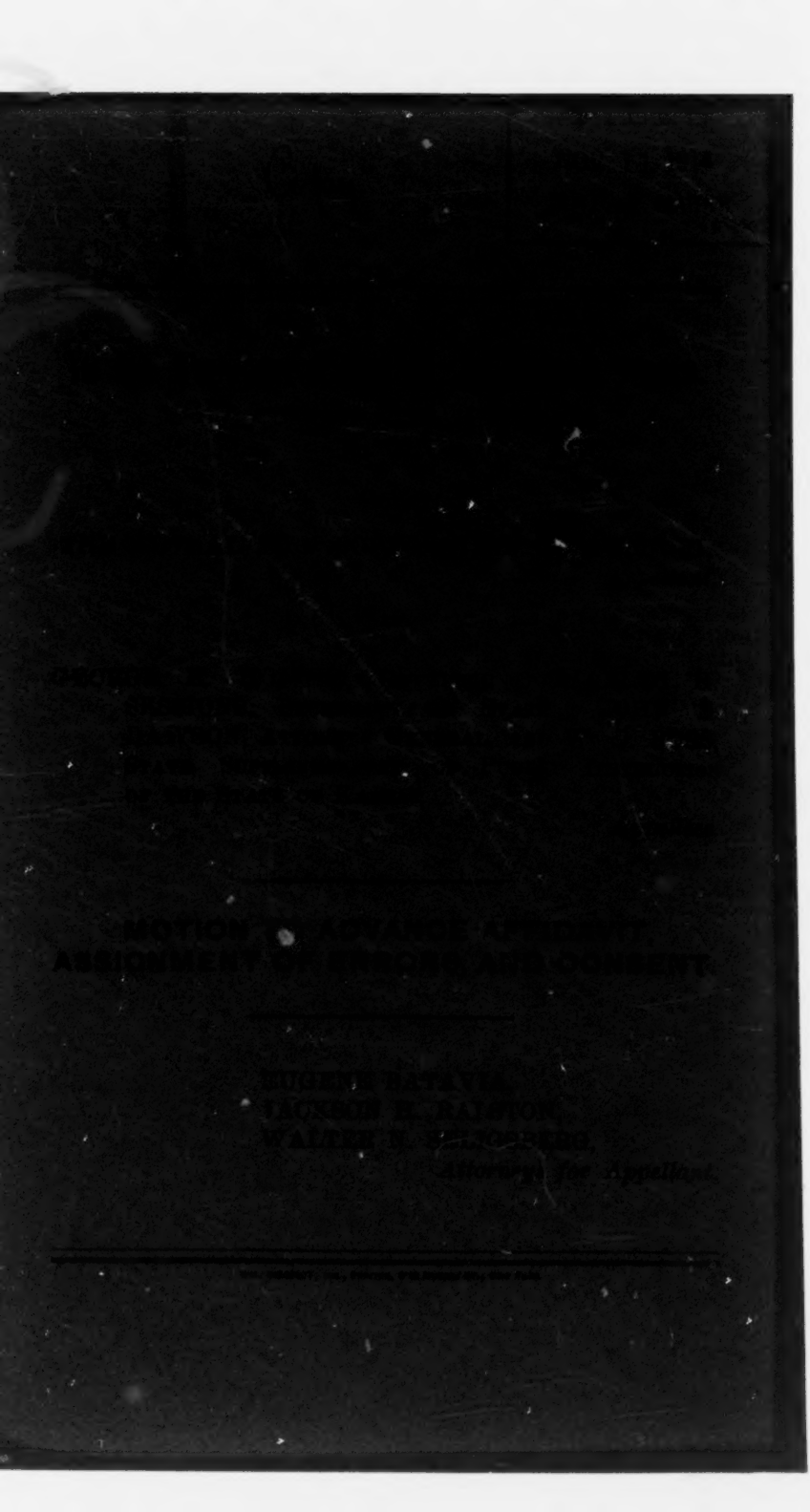
I further certify that the Original Citation is attached hereto and returned herewith.

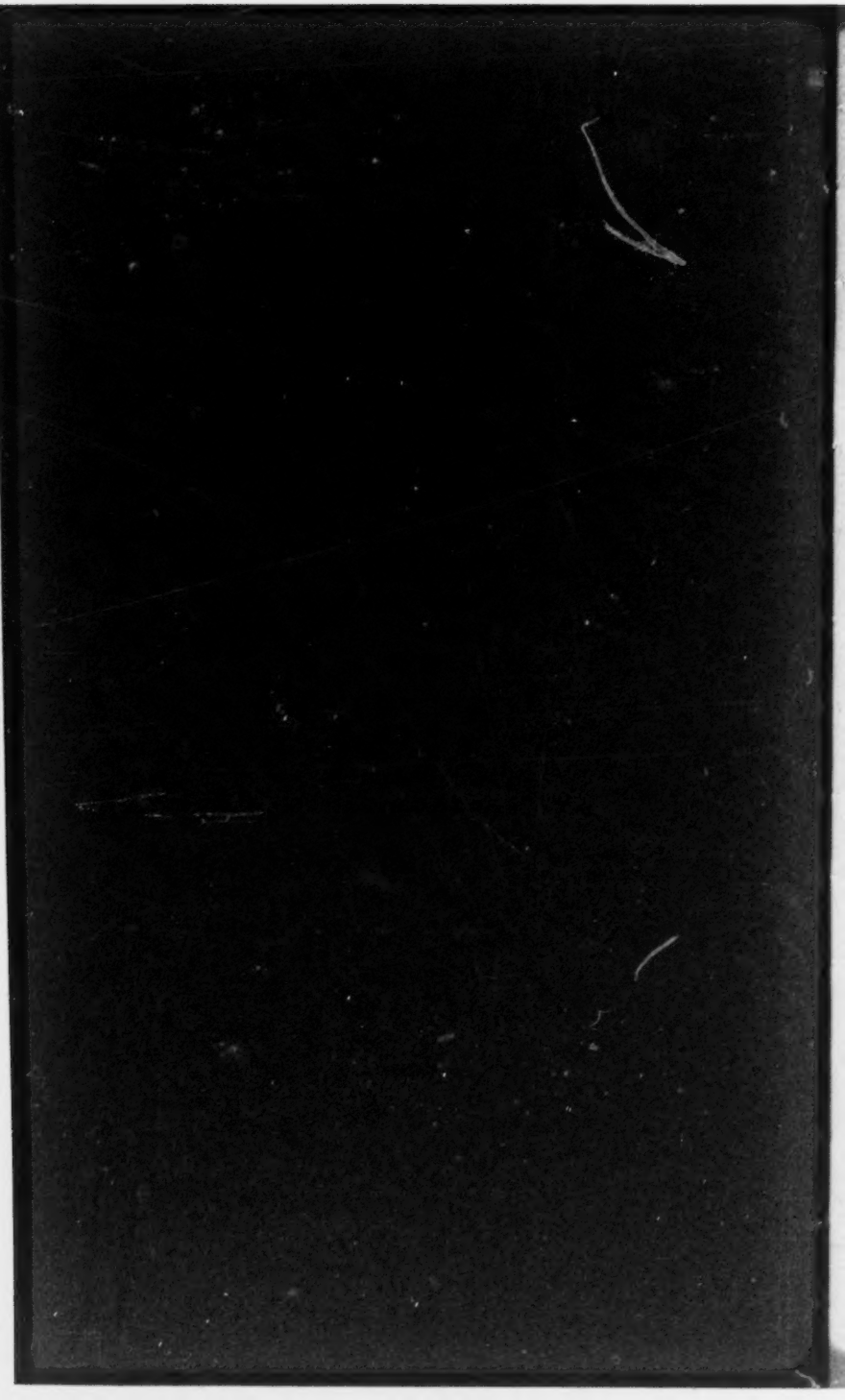
In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in Topeka, in said District of Kansas, this 25th day of July A. D. 1914.

[Seal of District Court, U. S., District of Kansas, 1861.]

MORTON ALBAUGH, *Clerk.*

Endorsed on cover: File No. 24,341. Kansas D. C. U. S. Term No. 597. The Mutual Film Corporation of Missouri, appellant, vs. George H. Hodges, governor; Charles H. Sessions, secretary of state; John S. Dawson, attorney general, and W. D. Ross, State supt. of public instruction, of the State of Kansas. Filed August 11, 1914. File No. 24,341.





Supreme Court of the United States.

October Term, 1914.

No. 597.

The Mutual Film Corporation of Missouri,
Appellant,

vs.

George H. Hodges, Governor; Charles H. Sessions, Secretary of State; John S. Dawson, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas,
Appellees.

Motion to Advance.

Appellant, Mutual Film Corporation of Missouri, moves the Court to advance this case and to take it up out of its order on the docket, on account of the special and peculiar circumstances which exist in connection therewith.

A similar motion to advance has been filed in the cases of The Mutual Film Company against

The Industrial Commission of Ohio, *et al.*, October Term, 1914, No. 457, and Mutual Film Corporation against The Industrial Commission of Ohio, *et al.*, October Term, 1914, No. 456, which cases involve the same considerations as the case at bar. In the event that the Court grants these motions to advance, it is suggested that all three cases might properly be argued together.

This case comes into this Court upon an appeal taken in accordance with the provisions of the Judicial Code of the United States. The case was brought to test the constitutionality, both under the Constitution of the United States and of the State of Kansas, of an Act passed by the General Assembly of Kansas in 1913, which established a censorship of motion picture films and provided for the censorship and approval of all films and the payment of a fee before such films could be exhibited in the State of Kansas.

It will appear from the affidavit of J. N. Naulty, filed in support of this motion, that similar motion picture censorship laws have already been passed and are now the subject of litigation in Ohio, Pennsylvania and Illinois, that the Congress of the United States and the Legislatures of many of the States are considering the enactment of similar laws, and that in many cities of the United States attempts are being made to enforce, more or less, official censorships of motion pictures.

It is of the greatest importance, not simply to the persons who are engaged in the manufacture, distribution and exhibition of motion picture films, but also to the millions of people in the United States who go daily to see exhibitions thereof, that the question as to whether any governmental authority can constitutionally impose a censorship upon motion pictures should be settled once and for all by the decisions of this Court.

It will appear from the assignment of errors, a printed copy whereof for the convenience of the Court in considering this motion is attached hereto, that the case at bar raises nearly all of the questions which will arise under any laws providing for the censorship of motion pictures, and that most of the questions raised are not peculiar to the case at bar but will apply with equal force to any of the censorship laws which have already been or may hereafter be enacted.

Appellant believes that the decision of the Court in the case at bar will dispose of the similar cases which are now pending in Ohio, Pennsylvania and Illinois, will avoid the necessity of bringing other suits elsewhere to test the validity of motion picture censorship laws which have already been or are about to be enacted, and will greatly aid the Congress of the United States and the Legislatures of many of the States in correctly framing constitutional legislation upon this subject.

Appellant therefore urges that such special and peculiar circumstances exist in connection with the case at bar as to justify the Court in advancing it and taking it up out of its regular order on the docket.

Respectfully submitted,

Eugene Batavia

~~Eugene Batavia~~,
Jackson H. Ralston,
~~Walter N. Seligsberg~~,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 597.

THE MUTUAL FILM CORPORATION OF MISSOURI,
Appellant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN S. DAWSON, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas,
Appellees.

STATE OF NEW YORK,
City and County of New York, } ss.:

JAMES N. NAULTY, being duly sworn, deposes and says: I reside in Orange, New Jersey, and am President of Mutual Film Corporation of Missouri, the appellant above named. Mutual Film Corporation of Missouri is engaged in the business of buying and distributing motion picture films and operates through two offices at St. Louis and Kansas City, Mo.

In many of the States of the United States the Legislatures have been asked to enact motion picture film censorship laws. Such laws have actually been passed in Ohio, Kansas and Pennsylvania. The Kansas law, the validity of which is

questioned in this suit, went into effect in April, 1913.

In Pennsylvania, a statute was enacted in 1911, but the Legislature failed, until 1913, to provide funds for its execution. It was intended to put this statute into effect on June 1, 1914, but a suit has been brought and is now pending in the Court of Common Pleas at Philadelphia to test its validity. Buffalo Branch—Mutual Film Corporation, a local subsidiary of Mutual Film Corporation, is one of the complainants therein. The Court of Common Pleas No. 5, of Philadelphia, has denied a motion for a preliminary injunction in this suit, and the case is being appealed to the Supreme Court of Pennsylvania. The principal ground for the decision of said Court was the decision in the court below in the case Mutual Film Corporation, appellant, vs. The Industrial Commission of Ohio, *et al.*, appellees, same being now pending on appeal in this court.

The City of Chicago enacted a film censorship ordinance some years ago, and that ordinance is now being tested in a suit in the District Court of the United States for the Northern District of Illinois, Mutual Film Corporation being one of the complainants therein. A motion for a preliminary injunction has been denied on the authority of the same decision in the case Mutual Film Corporation, appellant, vs. The Industrial Commission of Ohio, *et al.*, appellees, aforesaid. An appeal has been taken.

In Ohio, in 1913, an Act similar to the Kansas statute was enacted, and in October, 1913, test suits were brought in the United States District Court for the Northern District of Ohio, Eastern Division, to restrain the enforcement of said Act. Restraining orders were granted pending the

hearing of motions for preliminary injunctions. The motions came on to be heard before Judges Warrington, Killits and Day and were denied, and the Statute is now in force, the Court having refused to suspend its operation. Appeals are being taken from that decision to this Court, and motions to advance the appeal in the two causes are about to be made.

During the past winter similar film censorship laws were considered by the State Legislatures of Massachusetts, New York, New Jersey and Kentucky, but were not actually enacted.

There now exist unofficial or quasi-official police censorships in many cities of the United States, notably Cleveland, Ohio; Detroit, Michigan; Boston, Massachusetts; Milwaukee, Wisconsin; Portland, Oregon; Pittsburg, Pennsylvania; Washington, D. C.

There are now pending before the Congress of the United States three measures suggesting federal censorship of motion picture films, and lengthy hearings have been held before the House Committee on Education in regard thereto.

I am advised by counsel and verily believe that all of the censorships created by the statutes and ordinances already enacted, or which would be created under the laws the enactment of which has heretofore been proposed, are subject to the same criticisms as the censorship created by the Ohio statute the validity of which is questioned in this suit. If the Ohio statute be valid, then, with few exceptions, the other censorships will be valid. On the other hand, if the Ohio statute be invalid, then without exception, all of the other censorships will be invalid.

Not only the appellant, but all other persons engaged in the motion picture industry, are inter-

ested in the final determination of this suit by the Supreme Court of the United States, because in the opinion of many people engaged in the industry, its continued existence depends upon its freedom from censorship. I do not believe that any industry can exist in which the manufacturers, after expending large sums of money in producing their product, may be deprived of the privilege of disposing thereof because of the adverse opinion of one or more official censors, which opinion may rest only upon some unfounded whim or notion.

The motion picture industry differs from other industries in that the manufacturer must sell a certain number of positive prints of a negative in order to get back the cost thereof, the number required to be sold varying with the cost of the negative. If, therefore, as is now the case, these films are to be subjected to many boards of censors, and possibly, eventually, one in every State, each board having its own ideas. it will be almost impossible to manufacture film profitably. For what pleases one censor displeases another, and the manufacturer cannot possibly meet the varying requirements of all.

The opposition of appellant and of others in the industry to censorship does not arise from any desire to protect the dealing in or displaying of indecent or obscene pictures, because, as was alleged by appellant (complainant) in its bill in the Court below, and the statement still remains unchallenged, appellant does not produce or deal in any pictures of such a character. Appellant's opposition rests rather upon the ground that censorship is wrong in principle, and in violation of rights expressly guaranteed by the Constitution of the United States and of the several States.

Millions of people in the United States go daily to see exhibitions of motion picture films, and if any governmental authority, whether national, State or municipal, can constitutionally prescribe as to the character of films which may be exhibited to them, it is a matter of great public importance that the rights of such governmental authorities in respect thereto should be clearly defined.

That this case was deemed important by the Court below, and by both parties thereto, is best evidenced by the stipulation appearing at page 73 of the record, a copy of which is hereto annexed, marked "Exhibit A."

R. H. Dority

Sworn to and subscribed before me
this 28th day of October, 1914.

Notary Public.

"Exhibit A."

IN THE DISTRICT COURT OF THE UNITED STATES,

WITHIN AND FOR THE DISTRICT OF KANSAS—FIRST DIVISION.

THE MUTUAL FILM CORPORATION OF MISSOURI,
Complainant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN D. DAWSON, Attorney General, and W. B. Ross, State Superintendent of Public Instruction of the State of Kansas,
Defendants.

STIPULATION AND AGREEMENT FOR THE REMOVAL OF THE ABOVE ENTITLED CAUSE FROM THE DISTRICT COURT OF THE UNITED STATES, FIRST DIVISION OF KANSAS, TO THE SUPREME COURT OF THE UNITED STATES.

WHEREAS, a bill in equity by way of injunction is now pending before Honorable John C. Pollock, Judge of the District Court of United States for the District of Kansas in the First Division in the above entitled cause.

In view of the fact that the constitutionality of a certain act passed by the Legislature of the State of Kansas concerning the licensing and censoring of moving pictures to be exhibited in the State of Kansas and further that the constitutionality of said act both under the constitution of the State of Kansas and the constitution of the United States is made the main issue to be determined under the bill of complaint and pleadings so filed in the above entitled cause.

And in view of the further fact of the great public questions involved in this action and of the further fact that other cases involving like questions have been appealed to the Supreme Court of the United States from the States of Ohio and Illinois and in view of the fact further that the questions practically involved in the other cases that have gone to the Supreme Court of the United States are the same as in this action, all of said cases having been certified and appealed from the District Court of the United States from the other States, and this case like unto them involves the constitutionality under the Federal constitution of the same as the Kansas act involved.

It is therefore stipulated and agreed between the solicitors for the complainant herein and John S. Dawson, Attorney General of the State of Kansas, representing the defendants that the above entitled cause by transcript from the Clerk of the District Court of the United States within and for the District of Kansas, First Division, by the consent of the Honorable John C. Pollock, Judge of said Court, the same may be removed and transmitted to the Supreme Court of the United States and there, by the consent of such Court, this cause will be submitted and the questions therein involved along with the other cases

involving the same questions to be determined by said Court.

It is further stipulated that the expense of the making and the filing of the said transcript in this case and other expenses of filing in the Supreme Court of the United States shall be first paid and borne by the complainant in this action, the final costs and expenses however of this litigation upon its determination shall be borne and paid by the losing party.

The right of appearance and the briefing that may be filed in this action in the Supreme Court of the United States, is hereby reserved to the respective parties.

It is further stipulated that this cause shall be transmitted and filed with the Clerk of the Supreme Court of United States, with all practical speed and without unnecessary delay.

It is further stipulated that this stipulation shall be filed with the Clerk of the District Court of United States for the District of Kansas in the First Division and that the same shall become and form a part of the record certified up to said court.

Witness our signatures this 16th day of June, 1914.

EUGENE BATAVIA and
THOS. F. GATTS,
Solicitors for Complainant.

WALTER N. SELIGSBERG,
Of Counsel.

JOHN S. DAWSON,
Attorney General, Solicitor
for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES,

WITHIN AND FOR THE DISTRICT OF KANSAS—FIRST DIVISION.

MUTUAL FILM CORPORATION OF MISSOURI, Complainant, *vs.* GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN S. DAWSON, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, Defendants.	In Equity No. 11N.

Assignment of Errors.

Now comes complainant and respectfully shows the Court erred in entering its decree and orders of and as of June 25, 1914, in these respects:

1.

The Court erred in decreeing and ordering that there is no equity in the said Amended Bill of Complaint filed herein, and in dismissing the same therefor.

2.

The Court erred in refusing to order and decree a permanent injunction as prayed for in said Amended Bill of Complaint, restraining and en-

joining the said defendants therein from enforcing the provisions of the said Legislative Act of the State of Kansas set out, pleaded and made a part of said Amended Bill of Complaint, for the following reasons:

(*a*) Said Legislative Act in question is unconstitutional, being in conflict with and in violation of the Constitution of the United States, as well as the Constitution of the State of Kansas.

(*b*) Said Legislative Act in question is in violation of Section 10, Article I of the Constitution of the United States, in that no State shall, without the consent of the Congress, lay any imposts or duties on imports, or exports, except what may be absolutely necessary for executing its inspection laws, for the reason that a tax (called "fee") is provided for and levied by said Act in question upon imports of motion picture films into the State of Kansas, for the benefit of the General Revenue Fund of the State of Kansas, and not for the necessary inspection cost of said films.

(*c*) Said Legislative Act in question is in violation of Section 8, Article I of the Constitution of the United States, in that it is a tax upon interstate commerce, and the commerce between citizens of different States, being a revenue measure, for the benefit of the general revenue fund of the State of Kansas, under the guise of an inspection tax.

(*d*) Said Legislative Act in question is an attempt to prohibit by inspection and censorship the importation of a legitimate article of commerce into the State of Kansas, which article intrinsically is not a matter subject to inspection or censorship.

(*e*) Said Legislative Act in question is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of other States in transacting legal and lawful business with the citizens of the State of Kansas, and deprives the complainant of its property without due process of law, for the reason that said Legislative Act provides it to be "the duty of every person, firm or corporation, intending to sell, rent or exhibit any moving picture film or reel" within the State of Kansas, to present the same to the Superintendent of Public Instruction, to be inspected and censored by him for a tax (called "fee") of $2.00 for each film so presented, said "fee" to be paid into the General Revenue Fund of the State of Kansas; and thereby said Legislative Act imposes a tax, assessment, servitude and burden upon complainant's property, for the benefit of the General Revenue Fund of the State of Kansas, but makes no provision for a mode of confirming, or contesting the decision of the censor or the tax thus imposed, in the ordinary Courts of Justice.

3.

The Court erred in decreeing and ordering that there is no Equity in said Amended Bill of Complaint filed herein, and in dismissing the same therefor; and further erred in refusing to order and decree a permanent injunction, as prayed for in said Amended Bill of Complaint, restraining and enjoining said defendants therein from enforcing the provisions of the said Legislative Act of the State of Kansas, set out, pleaded and made a part of said Amended Bill of Complaint, for the following reasons:

Said Legislative Act in question is one of censorship and is in violation of the Constitutional guarantees of the freedom of speech and of the press, so provided, for by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides: "That no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and Section 11 of the Bill of Rights of the Constitution of the State of Kansas, which provides that: "The Liberty of the Press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such rights."

THOS. F. GATTS,
EUGENE BATAVIA,
Solicitors for Complainant.

WALTER N. SELIGSBERG,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. 597.

MUTUAL FILM CORPORATION OF MISSOURI,
Appellant,
against
GEORGE H. HODGES, Governor, *et al.*,
Appellees.

Consent.

The appellees hereby consent to the granting by the Supreme Court of the United States of the motion to advance, filed by the appellant in the above-entitled cause.

John S. Dawson

Attorney General of Kansas,
Representing all the Appellees.

Dated Nov 30, 1914.

Office Supreme Court, U.
FILED
DEC 7 1914
JAMES D. MAHER
CLE

No. 597.

In the Supreme Court of the United States

October Term, 1914.

THE MUTUAL FILM CORPORATION OF MISSOURI,
Appellant,
vs.
GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN S. DAWSON, Attorney General, and W. D. ROSS, State Superintendent of Public Instruction of the State of Kansas,
Appellees.

Appeal from the District Court of the United States for the District of Kansas.

BRIEF OF APPELLANT, THE MUTUAL FILM CORPORATION OF MISSOURI.

EUGENE BATAVIA,
JACKSON H. RALSTON,
WALTER N. SELIGSBERG,
Attorneys for Appellants.

WM. B. SANDERS,
HAROLD T. CLARK,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

No. 597.

In the Supreme Court of the United States

October Term, 1914.

THE MUTUAL FILM CORPORATION OF MISSOURI,
Appellant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN S. DAWSON, Attorney General, and W. D. ROSS, State Superintendent of Public Instruction of the State of Kansas,
Appellees.

Appeal from the District Court of the United States for the District of Kansas.

BRIEF OF APPELLANT, THE MUTUAL FILM CORPORATION OF MISSOURI.

EUGENE BATAVIA,
JACKSON H. RALSTON,
WALTER N. SELIGSBERG,
Attorneys for Appellants.

WM. B. SANDERS,
HAROLD T. CLARK,
Of Counsel.

No. 597.

In the Supreme Court of the United States

October Term, 1914.

THE MUTUAL FILM CORPORATION OF MISSOURI,
Appellant,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN S. DAWSON, Attorney General, and W. D. ROSS, State Superintendent of Public Instruction of the State of Kansas,
Appellees.

BRIEF OF APPELLANT, THE MUTUAL FILM CORPORATION OF MISSOURI.

The above entitled case comes into this Court upon an appeal taken from an order entered by Hon. John C. Pollock, Judge of the United States District Court for the District of Kansas, First Division, denying the application of The Mutual Film Corporation of Missouri, a corporation of the State of Delaware, doing business with exhibitors of motion pictures in the State of Kansas, for an injunction restraining the enforcement of the act passed by the Legislature of the State of Kansas (which act became effective on the first day of April, 1913, and is hereinafter set forth at length), which provided for the censorship and approval of motion picture films by the State Superintendent of Public Instruction, there being

the right to have an additional examination of rejected films made by a commission consisting of the Governor, Attorney General and Secretary of State. Said act reads in full as follows (Record, page 10-11):

An Act regulating the exhibiting or using of moving-picture films or reels; providing and regulating the examination and approval of moving-picture films and reels, and fixing penalties for the violation of this act, and making an appropriation for clerical help to carry this act into effect.

Be it enacted by the Legislature of the State of Kansas:

Section 1. That on and after April 1st, 1913, it shall be unlawful for any person, firm or corporation to exhibit or use any moving-picture film or reel unless the said film or reel shall have been examined and approved by the state superintendent of public instruction, as hereinafter provided for; provided, that nothing in this act shall apply to moving picture films or reels used exclusively in institutions of learning in Kansas.

Sec. 2. In addition to the duties now imposed upon the state superintendent of public instruction, it shall be his duty **to examine all moving picture films or reels intended for exhibition in this state, and approve such as he shall find to be moral and instructive, and to withhold his approval from such as tend to debase or corrupt the morals.** Upon such moving picture films or reels examined by him, and which shall be approved by him, there shall be stamped or written a certificate signed by him showing that such picture has been examined and approved by him, giving the date of such approval.

Sec. 3. The said superintendent of public instruction shall keep an accurate record of all examinations made by him and the date thereof, and by whom presented for examination, and noting such pictures as shall be approved and such as shall not have been approved, and briefly stating his reasons for withholding his approval of such as are not approved.

Sec. 4. For each examination made by said officer he shall receive the sum of two dollars for each moving picture film or reel. No picture film or reel shall be examined until such fee shall have been paid to him, and all such fees shall be paid by him on the last day of each quarter to the state treasurer, and by said state treasurer credited to the general revenue fund; provided, that the treasurer shall issue receipts for such fees in triplicate, one to the state auditor, one to the state superintendent and one to be kept by him and filed in his office. Provided, that for good and sufficient reasons shown, the governor may authorize the employment by the superintendent of public instruction, one or more additional clerks in his office as may be necessary, at a per diem not to exceed three dollars per day for each day actually employed, which per diem shall be paid out of the general revenue fund on warrants duly issued and payable in the same manner as other clerks in said office are paid.

Sec. 5. That the said state superintendent of public instruction shall have general power and authority to supervise and regulate the display of all moving picture films or reels in all places of amusement or elsewhere within this state. Said power and authority shall include the power to inquire into and investigate, and to have displayed for his benefit, to aid him in his investigation, the moving picture films or reels which are intended to be displayed, **and said state superintendent of public instruction shall approve such moving-picture films or reels as shall be moral and proper, and disapprove such moving-picture films or reels as are sacreligious, obscene, indecent or immoral, or such as tend to corrupt the morals**; provided, however, in the case he should disapprove of any moving-picture film or reel, the person, firm or corporation offering the same fore examination may have the same examined by a commission consisting of the governor, attorney general and secretary of state, who shall examine said reel or film, and if they, or a majority of them shall find

the same is fit for exhibition, on their order the said superintendent of public instruction shall endorse his approval thereon.

Sec. 6. It shall be the duty of every person, firm or corporation intending to sell, rent or exhibit any moving-picture film or reel within this state, to furnish to said superintendent of public instruction, as he may require, a description of said moving-picture film or reel, describing the scenes and purposes of any film or reel, and to exhibit and display for his examination and approval or disapproval any such film or reel.

Sec. 7. Any person, firm or corporation exhibiting or permitting to be exhibited any unapproved moving-picture film or reel shall be guilty of a misdemeanor, and shall be fined not less than twenty-five dollars nor more than one hundred dollars for the first offense and not less than one hundred dollars for each subsequent offense. Each unapproved moving-picture film or reel exhibited, and each day the same shall be exhibited, shall constitute a separate offense.

Sec. 8. All laws and parts of laws so far as they conflict herewith are hereby repealed.

Sec. 9. This act shall take effect and be in force on and after the first day of April, 1913, and its publication in the official state paper.

Although this act is not identical with the Ohio Motion Picture Censorship law, the validity of which is attacked in the cases of Mutual Film Corporation, appellant, vs. The Industrial Commission of Ohio, et al., October term, 1914, No. 456, and The Mutual Film Company vs. The Industrial Commission of Ohio, October term, 1914, No. 457, the fundamental purpose of both acts is the same, to-wit, the censorship of motion pictures, and the nature of the business conducted by the appellants in the three cases is very similar, that of The Mutual Film

Corporation of Missouri and of Mutual Film Corporation, appellant in Case No. 456, being virtually identical.

Although this Kansas case was argued in the court below before the two Ohio cases, no order was entered herein until after the Ohio cases had been decided and appealed to the United States Supreme Court. Thereupon counsel for both parties, recognizing that the constitutional questions involved in this Kansas case were substantially identical with those in the two Ohio cases and also in an Illinois case which is still in the Court of Appeals there, entered into a stipulation and agreement which provided as follows (Record, pages 73-74):

Stipulation and Agreement for the Removal of the Above Entitled Cause from the District Court of the United States, First Division of Kansas, to the Supreme Court of the United States.

Whereas, a bill in equity by way of injunction is now pending before Honorable John C. Pollock, Judge of the District Court of United States for the District of Kansas in the First Division in the above entitled cause.

In view of the fact that the constitutionality of a certain act passed by the legislature of the State of Kansas concerning the licensing and censoring of moving pictures to be exhibited in the State of Kansas and further that the constitutionality of said act both under the constitution of the State of Kansas and the constitution of the United States is made the main issue to be determined under the bill of complaint and pleadings so filed in the above entitled cause.

And in view of the further fact of the great public questions involved in this action and of the further fact that other cases involving like questions

have been appealed to the Supreme Court of the United States from the State of Ohio and Illinois and in view of the fact further that the questions practically involved in the other cases that have gone to the Supreme Court of the United States are the same as in this action, all of said cases having been certified and appealed from the District Court of the United States from the other states, and this case like unto them involves the constitutionality under the Federal constitution the same as the Kansas act involved.

It is therefore stipulated and agreed between the solicitors for the complainant herein and John S. Dawson, Attorney General of the State of Kansas, representing the defendants that the above entitled cause by transcript from the Clerk of the District Court of the United States within and for the District of Kansas, First Division, by the consent of the Honorable John C. Pollock, Judge of said Court, the same may be removed and transmitted to the Supreme Court of the United States and there, by the consent of such court, this cause will be submitted and the questions therein involved along with the other cases involving the same questions to be determined by said court.

It is further stipulated that the expense of the making and the filing of the said transcript in this case and other expenses of filing in the Supreme Court of the United States shall be first paid and borne by the complainant in this action, the final cost and expenses, however, of this litigation upon its determination shall be borne and paid by the losing party.

The right of appearance and the briefing that may be filed in this action in the Supreme Court of the United States, is hereby reserved to the respective parties.

It is further stipulated that this cause shall be transmitted and filed with the clerk of the Supreme Court of United States, with all practical speed and without unnecessary delay.

> It is further stipulated that this stipulation shall be filed with the clerk of the District Court of the United States for the District of Kansas in the First Division and that the same shall become and form a part of the record certified up to said court.

This stipulation and agreement was filed on the 3rd day of July, 1914, and on the same day Hon. John C. Pollock, the presiding judge, entered an order dismissing complainant's bill and allowing an appeal to the United States Supreme Court, and continued in force the temporary restraining order suspending the enforcement of the censorship act until the final determination by this court of the appeal herein (Record, page 69).

It may be well to mention that it was by agreement between counsel that the hearing in the court below took place before one judge rather than three judges (see Record, page 33 and 34).

In view of the identity of the questions presented in the three cases, Nos. 456 and 457 (the two Ohio cases), and No. 597 (this Kansas case), all of which have been advanced by this Court and set for hearing upon the same date, we shall not reargue herein the questions so fully covered in the brief filed in cases Nos. 456 and 457, but ask leave of the court to embody herein by reference, as fully as though the same were rewritten at length, the entire argument as made in that brief.

There are, however, a few special matters in connection with the record in this Kansas case to which we wish to call attention so as to assist the court in considering this case. The following paragraphs have no necessary logical connection, but serve to point out some of the respects in which the Ohio and Kansas records differ from or supplement one another:

1. The provision in the constitution of the State of Kansas relative to freedom of publication is contained in Section 11 of the Bill of Rights, which reads as follows:

> "The liberty of the press shall be inviolate, and all persons may freely speak, write or publish their sentiments, being responsible for the abuse of such right, and in all civil or criminal actions for libel, the truth shall be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

2. It appears from the record in this Kansas case (see pages 11-13) that a motion picture exhibitor, Lew S. Nathanson, has been arrested for showing appellant's uncensored films. The Mutual Film Corporation of Missouri has, under the doctrine of Savage vs. Jones, 225 U. S., 501, and the other similar cases cited in the Ohio brief, the right to question herein the validity of the Kansas Motion Picture Censorship law as fully as said Lew S. Nathanson could have done through habeas corpus proceedings.

3. Although an answer was filed by the defendants in this Kansas case putting complainant upon proof of certain of the allegations in its bill, this proof was fully supplied by the affidavits of Lew S. Nathanson (Record, pages 22-25) and of Patrick J. Hall (Record, pages 26-29), which affidavits were uncontradicted. This Kansas case therefore stands in substantially the same shape so far as evidence is concerned, as the two Ohio cases in which no answer was filed.

4. The tests to be applied in censoring films under the Kansas act are somewhat different from those under the Ohio act, and in one respect might be even more open to abuse. The Ohio act provides:

"Only such films as are in the judgment and discretion of the Board of Censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."

The Kansas act provides:

"Said State Superintendent of Public Instruction shall approve such moving picture films or reels as shall be moral and proper, and disapprove such moving pictures as are **sacreligious,** obscene, indecent or immoral, or such as tend to corrupt the morals."

Surely hardly any question could be suggested upon which the minds of people might differ more than as to what films were or were not sacriligious.

5. The affidavits of Lew S. Nathanson and of Patrick J. Hall (Records, pages 22-29) supplement the similar affidavits filed by J. E. Hennessy, John Collier, Christian M. Christensen and Wesley D. Ward as to the manner in which the motion picture business is conducted, the nature of the subjects portrayed, the magnitude of the business and the expense, inconvenience, injustice and delay, resulting in a complete disruption of the business, which would result from the imposing of a "previous restraint" upon the exhibition of motion pictures through the enforcement of a censorship law.

6. No formal opinion was rendered by the court below in this Kansas case as was done in the Ohio cases. The transcript of the proceedings which took place upon the hearing of this case before Hon. John C. Pollock on May 14th, 1913 (see Record, pages 31-69) contains many valuable suggestions by the court, as well as a full statement by counsel of the nature of appellant's business and the injurious effect which censorship would have upon it.

CONCLUSION.

In reliance upon the authorities set forth and upon the argument made at length in the brief filed in the two Ohio cases, Nos. 456 and 457, which brief is not only embodied herein by reference, as above set forth, but for the convenience of the Court is also physically attached hereto, we respectfully urge that the Kansas Motion Picture Censorship Law, as well as the Ohio Motion Picture Censorship Law, should be declared unconstitutional and invalid.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1914.

MUTUAL FILM CORPORATION,
Appellant,
vs.
THE INDUSTRIAL COMMISSION OF OHIO, et al.,
Appellees.
No. 456.

THE MUTUAL FILM COMPANY,
Appellant,
vs.
THE INDUSTRIAL COMMISSION OF OHIO, et al.,
Appellees.
No. 457.

BRIEF OF APPELLANTS, MUTUAL FILM CORPORATION AND THE MUTUAL FILM COMPANY.

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In the Supreme Court of the United States

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—o—

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Appellees.
No. 457.

—o—

BRIEF OF APPELLANTS, MUTUAL FILM CORPORATION AND THE MUTUAL FILM COMPANY.

—o—

STATEMENT OF FACTS.

Note: The references to pages in the record refer to the record in Case No. 456, the paging being slightly different from that of the record in Case No. 457.

The above entitled cases come into this Court upon appeals taken in accordance with Section 266 of the Federal Judicial Code from an order entered by the United States District Court, for the Northern District of Ohio, on the 3rd day of April, 1914, denying the application of the two film companies, complainants in the court below, for an interlocutory injunction restraining the en-

forcement of the act passed by the General Assembly of the State of Ohio, April 16th, 1913 (103 Ohio Laws, page 399), hereinafter set forth at length, which act created under the authority and supervision of the Industrial Commission of Ohio a Board of Censors of motion picture films and provided for the censorship and approval of all films by said Board and the payment of a fee before such films could be exhibited in the State of Ohio (See Record, pages 71 and 72).

The court below which heard the applications was composed of Circuit Judge J. W. Warrington and District Judges John M. Killits and William L. Day, the proceedings being prosecuted in accordance with Section 266 of the Judicial Code. Their **per curiam** opinion will be found on Record pages 59-69.

Although the appellants in the two cases Nos. 456 and 457 are separate corporations,—Mutual Film Corporation being a corporation of Virginia, and The Mutual Film Company being a corporation of Ohio,—and although there are some differences in the way in which their business is conducted, yet the questions involved are the same, the records in both cases are nearly identical, and the court below treated them together, rendering the one opinion to cover both. We shall, therefore, present them together in this brief.

Before proceeding with the statement of the points involved in the two cases, we wish to call the attention of the Court in a general way to the evidence which came before the judges in the court below and which is now embodied in the records filed in this Court. The complainants filed their bills of complaint alleging in detail the nature of their business and the manner in which it is conducted and specifying the grounds upon which the constitutionality of the Ohio Motion Picture Censorship

Law was assailed, violations of both the United States and the Ohio Constitution being urged. An affidavit as to the truth of the allegations contained in these bills was attached thereto. The complainants also filed additional affidavits, amplifying and supporting the allegations of the bills. The defendants filed no answer in either case, nor a single affidavit. Upon the hearing defendants offered the testimony of James W. Maddox, Chairman of the Ohio Board of Censors (See Record, page 53), but only for the purpose of showing that complainants were not entitled to have a temporary restraining order issued pending the decision of the Court upon complainants' applications. He did not in any way attempt to contradict any of the allegations contained in complainants' bills or affidavits affecting the merits of the controversy. Indeed, his testimony served to substantiate some of complainants' allegations as to the magnitude of the motion picture business, the way in which it is conducted, the delays and burdens necessarily incident to censorship, and the fact that the burden of paying the censorship fees will fall upon complainants and the few other companies operating film exchanges (See Record, pages 56, 57, 58).

The records, therefore, bring these cases before this Court with the allegations made in complainants' bills and affidavits not only uncontradicted, but wholly unchallenged.

The manner in which motion pictures are produced is well known to the Court, having been well stated by it in the case of Kalem Company vs. Harper, 222 U. S. 55, at page 60. The following statement thereof is made in the bill of complaint (See Record, page 3):

> "That a motion picture film consists of a series of instantaneous photographs of action upon the

stage or in the open, either action that may be purposely staged or action that may be spontaneous. By the projection of these photographs or of positive prints of them upon a screen with great rapidity there appears to the eye an illusion of motion, and the beholder sees these constantly changing photographs as one photograph, changing and showing action."

The records set forth that Mutual Film Corporation is a corporation of Virginia having an executive office in New York and engaged in the business of purchasing, selling and leasing motion picture films which are produced by the manufacturers chiefly in the States of California and New York, in smaller quantities in European and other foreign countries, and to some extent also in states of the United States other than Ohio,—none of the films handled by it being made in Ohio.

This company sells films in large quantities to film exchanges, the nature of which is hereinafter described, doing business in the State of Ohio, and ships said films into Ohio to the purchasers as articles of interstate commerce. Mutual Film Corporation also operates a motion picture film exchange in the City of Detroit, Michigan, from which it rents or leases large quantities of film to motion picture exhibitors in Michigan and in those parts of Ohio adjacent to Michigan and particularly in the City of Toledo, Ohio.

The Mutual Film Company is an Ohio Corporation. It buys films from Mutual Film Corporation and distributes them among exhibitors in the States of Ohio, Pennsylvania, West Virginia and Kentucky from its film exchanges in Cleveland, Columbus and Cincinnati.

Film exchanges, as the name implies, are nothing more nor less than circulating libraries or clearing houses for films and had their origin in the demand of the pub-

lic for so frequent a change in the subjects shown to them that no exhibitor could afford to purchase outright all of the film required to meet this demand.

The films handled by the appellants are exhibited in nearly every conceivable kind of place before gatherings of every nature. In the language of the uncontradicted affidavit of J. E. Hennessy (Record, page 18):

> "Theatres are by no means the only places in which films furnished by complainant to exhibitors within the State of Ohio are exhibited. Complainant's films have been shown not only in theatres but in churches, Sunday schools, Young Men's Christian Associations, Young Women's Christian Associations, public schools, libraries, Chambers of Commerce, jails, reformatories, State Institutions for the Insane, as well as other State Institutions, halls, lodge rooms, factories, store windows, before open air gatherings, such as Chautauquas and political meetings, before medical societies, and, in short, said films have been shown in nearly every conceivable kind of place before gatherings composed of persons of the most widely divergent views upon religious, political, social and economic questions."

The bills contain the following statements as to the nature of the subjects depicted in complainants' films (Record, page 3):

> "That the motion pictures, the films for which are purchased, sold and leased by complainant, depict dramatizations of standard novels and short stories and the performance of standard dramas, many of said novels, stories and dramas being by the world's greatest authors; that they also exhibit many subjects of scientific interest, such as showing the various uses that may be made of electricity, showing the manner of development and growth of various forms of animal and plant life, giving pictures of trips of exploration in the interest of science, of travels in strange lands, and pictures of other subjects covering a range as wide as life itself, which are educational, instructive and amusing.

That one of the most important classes of subjects exhibited in complainant's motion picture films is the depicting of events of great historical and current interest as they occur throughout the world—the same events which are described in words and by photographs in newspapers, weekly periodicals, magazines and other publications—such historical and current events being by a well-organized system by which photographs are promptly secured thereof, depicted in motion pictures within a few days after they happen; this regular furnishing and publishing of news through the medium of motion pictures being done under the name of the 'Mutual Weekly.' "

We shall have occasion in this brief to discuss in greater detail the subjects portrayed.

Both bills contain the following uncontradicted allegation:

"That none of the motion picture films purchased, sold or leased by the complainant depict anything of an immoral or harmful character."

In the motion picture business, just as with articles or photographs in the newspaper business, the age or novelty of a film has a very direct bearing upon its value for exhibition purposes. Indeed, it is one of the most important elements entering into the purchase or rental cost of films. In recognition of this fact film manufacturers have established what is known as a "Release Day". The bills contain the following allegation in regard thereto (Record, page 4):

"It is the custom in the motion picture business, observed by all manufacturers, that a subject shall be released or published in all theatres in the United States on the same day, which is known as release day, and the age or novelty of the film depends upon the proximity of the date of exhibition to such release day. Films shown on the release day have never before been shown in public, and the public to

whom they appeal is therefore unlimited. Such public becomes more and more limited by each additional exhibit of the reel."

The bills and affidavits set forth the magnitude of the business transacted by the complainants with parties in Ohio and show that the enforcement of the Ohio Censorship Law will require them to pay fees amounting to many thousands of dollars a year as well as subject them to delay and inconvenience in the carrying on of their business, which would damage them irreparably.

The Ohio Motion Picture Censorship Law (See 103 Ohio Laws, pages 399-401), the validity of which is questioned by the appellants, reads as follows (Record, pages 60-61):

"(1) Section 1. There is created under the authority and supervision of the Industrial Commission of Ohio a board of censors of motion picture films. * * *

Section 2. * * * Each member of the board of censors shall receive an annual salary of one thousand five hundred dollars per year. Such salary and expenses shall in no case exceed the fees paid to the Ohio board of censors for examination and approval of motion picture films.

The members of the board shall be considered as employes of the industrial commission and shall be paid as other employes of such commission are paid. The industrial commission shall appoint such other assistants as may be necessary to carry on the work of the board.

Section 3. It shall be the duty of the board of censors to examine and censor as herein provided, all motion picture films to be publicly exhibited and displayed in the state of Ohio. Such films shall be submitted to the board before they shall be delivered to the exhibitor for exhibition. The board shall charge a fee of one ($1.00) dollar for each reel of film to be censored which does not exceed one thou

sand (1,000) lineal feet; for any reel of film exceeding one thousand (1,000) lineal feet, the sum of two ($2.00) dollars shall be charged. All moneys so received shall be paid each week into the state treasury to the credit of the general revenue fund.

Section 4. Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board. They shall be stamped or designated in an appropriate manner and consecutively numbered. Before any motion picture film shall be publicly exhibited, there shall be projected, upon the screen the words 'Approved by the Ohio Board of Censors' and the number of the film.

Section 5. The board of censors may work in conjunction with any censor board or boards of legal status of other states as a censor congress and the action of such congress in approving or rejecting films shall be considered as the action of the board and all films passed, approved, stamped and numbered by such congress, when the fees therefor have been paid to the Ohio board, shall be considered approved by such board.

Section 6. Ninety days after this act shall take effect no films may be publicly shown or exhibited within the state of Ohio unless they have been passed and approved by the board or the censor congress and stamped and numbered by such board, or congress, as provided for herein.

Section 7. Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio unless it shall have been passed, approved and stamped by the Ohio board of censors or the congress of censors shall upon conviction thereof, be fined not less than twenty-five ($25.00) dollars nor more than three hundred ($300.00) dollars, or imprisoned not less than thirty days nor more than one year, or both, for each offense.

Section 8. Any person in interest being dissatisfied with any order of such board shall have the same rights and remedies as to filing a petition for hearing on the reasonableness and lawfulness of any order of such board or to set aside, vacate or amend any order of such board as is provided in the case of persons dissatisfied with the orders of the industrial commission."

Appellants recognize that there is in some quarters a prejudice against motion pictures. This is a prejudice born of ignorance of the facts, the same unreasoning prejudice which every new thing in the physical world, or in the world of ideas, is called upon to meet and overcome. The appellants ask the most careful examination of their business as revealed in detail in the records filed herein. It is as companies admittedly engaged in an important, many-sided, and thoroughly legitimate business, one branch of which is akin to a high-class theatrical business, and another of which is, as will be more fully hereinafter developed, in no essential respect different from that conducted by standard newspapers and periodicals that complainants make the following argument to this Court:

ARGUMENT.

It is the purpose of the appellants in presenting their cases to this court to confine their argument to only the most important of the questions raised in the assignments of errors. These are stated therein as follows (see Record, pages 72-73):

"Said Court erred in refusing to enjoin the enforcement of said Ohio Motion Picture Censorship Law, for the reason that the same imposes an unlawful burden upon interstate commerce, in viola-

tion of Section 8, Article I of the Constitution of the United States."

"Said Court erred in refusing to enjoin the enforcement of said Ohio Motion Picture Censorship Law, for the reason that the same violates the right to freely speak, write and publish its sentiments on all subjects, guaranteed to complainant by Section 11, Article I of the Constitution of the State of Ohio."

"Said Court erred in refusing to enjoin the enforcement of said Ohio Motion Picture Censorship Law, for the reason that the same violates the provisions of Section 1, Article II of the Constitution of the State of Ohio, in that it attempts to delegate legislative power to the Ohio Board of Censors and to other Boards in Conjunction with which they may work."

No doubt can exist as to the right of the court below and of this Court to pass upon all of these questions even though the second and third relate to guaranties under the Constitution of the State of Ohio rather than under the Constitution of the United States. As was stated in the opinion of the court below (Record, page 60):

"No question of jurisdiction is presented. Diversity of citizenship in the first case and the presence of Federal questions in both cases, are admitted; and the latter are sufficient to vest the court with jurisdiction, even though it should decide the Federal questions adversely to the complainants, or, finding it unnecessary to pass upon such questions, should decide the cases on State questions alone. Siler vs. Louisville & Nashville R. R. Co., 213 U. S., 175, 191; Mich. Cent. R. R. vs. Vreeland, 227 U. S., 59, 63, 64; Louisville & Nashville R. R. vs. Siler, 186 Fed., 176, 179; Ohio River & W. Ry. Co. vs. Dittey, 203 Fed., 537, 549."

Additional authorities in accord are:

Michigan Central R. R. Co. vs. Powers, 201 U. S., 245.

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, at p. 154.

R. R. Co. vs. Mississippi, 102 U. S., 135.

Washington-Oregon Corp. vs. City of Chehalis, 202 Fed., 591.

San Francisco Gas & Elec. Co. vs. City of San Francisco, 189 Fed., 943.

Appellants are entitled to invoke the protection of the constitutional guaranty of freedom of publication as fully as any person with whom they do business could do.

The bill of complaint of Mutual Film Corporation to which no answer was filed by the appellees and the uncontradicted affidavits filed in support thereof, set forth that Mutual Film Corporation is engaged in interstate commerce in bringing into Ohio from other states films which it intends to sell there and in renting out from its film exchange in Detroit films which are to be exhibited in Ohio and Michigan. (See Record, pages 4, 5, 45, 46.)

The bill of complaint of The Mutual Film Company, supported by affidavits, also uncontradicted, alleges:

> "That the nature of the business of the film exchanges owned and operated by the complainant in the Cities of Cleveland, Columbus and Cincinnati, Ohio, is as follows:
>
> Complainant purchases from manufacturers or jobbers in motion picture films, said contracts of purchase being made outside of the State of Ohio, as above set forth, large quantities of motion picture films, which it distributes among the three film exchanges operated by it, and which said film ex-

changes in turn rent out to exhibitors in Ohio, Pennsylvania, West Virginia and Kentucky for short periods at stated weekly rentals."

Each of the bills further alleges (Record, page 5) and this statement is uncontradicted—

> "that by reason of the nature of the business, complainant would be compelled to bear the expense of having its films censored by said board of censors, because said films are the property of complainant, and because none of complainant's customers in the State of Ohio will purchase or hire from complainant any uncensored motion picture films."

This statement is confirmed by the testimony of Mr. Maddox, chairman of the Ohio Board of Censors (see Record, page 58).

Appellants are entitled to carry on their interstate commerce free from all unconstitutional burdens, and are entitled to challenge the constitutionality of any burden or restraint which any state may seek to impose upon that commerce. As was said by this Court in Savage vs. Jones, 225 U. S., 501, at pages 519-521:

> "It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show injury. Southern Railway Co. vs. King, 217 U. S., 524, 534. The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods 'to be delivered free on board of cars' at that point, 'and delivered to purchasers and consumers within the State of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers.' In answer, it must again be said that 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' Swift & Co. vs. United States, 196 U. S., 375, 398; Rearick vs. Pennsylvania, 203 U. S., 507, 512. It clearly appears from the bill that the complainant

was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. Leisy vs. Hardin, 135 U. S., 100; In re Rahrer, 140 U. S., 545, 559, 560; Plumley vs. Massachusetts, 155 U. S., 461, 473; Vance vs. Vandercook Co. (No. 1) 170 U. S., 438, 444, 445; Schollenberger vs. Pennsylvania, 171 U. S., 1, 22-25; Heyman vs. Southern Railway Co., 203 U. S., 270, 276. An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the State Chemist had threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the article within the State and had distributed broadcast throughout the State warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands. Scott vs. Donald, 165 U. S., 107, 112; Ex Parte Young, 209 U. S., 123, 159, 160; Ludwig vs. Western Union Telegraph Co., 216 U. S., 146; Hopkins vs. Clemson College, 221 U. S., 636, 643-645; Philadelphia Co. vs. Stimson, 223 U. S., 605, 620, 621."

See also:

Collins vs. New Hampshire, 171 U. S., 30.
Caldwell vs. North Carolina, 187 U. S., 622.
Crenshaw vs. Arkansas, 227 U. S., 389, 397.

In the consideration of the argument made hereafter in this brief, that the Ohio Censorship Law violates the guaranty of freedom of publication contained in Section 11 of Article I of the Ohio Constitution, it is important that the principles announced in the foregoing cases should be carefully borne in mind. The court should consider not simply whether the enforcement of that censorship law will prevent appellants from exercising their right to "freely speak, write and publish their sentiments on all subjects," but whether it will infringe upon the similar rights of those persons with whom appellants do business, and thereby less directly, but none the less certainly, impose a burden upon the interstate commerce in which appellants are engaged.

It will be more fully developed hereafter that motion pictures are today recognized as an extremely effective medium for the publication of sentiments which persons interested in some particular "cause" desire to impress upon the minds of the thousands of people who go daily to see exhibitions of moving pictures.

Appellants have the right to ask the Court to consider the constitutionality of the Ohio Censorship Law from just as broad a viewpoint as it would if this case were one brought by an individual propagandist whose films had been rejected by the censors or a habeas corpus proceeding brought by an individual exhibitor who had been arrested for exhibiting uncensored films.

1. Appellants' Motion Pictures Are Entitled to the Protection Afforded by the Freedom of Publication Guaranty Contained in Section 11 of Article I of the Constitution of the State of Ohio.

Section 11, Article I of the Constitution of the State of Ohio, reads as follows:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

For the purpose of convenience we shall in this brief refer to the constitutional guaranty contained in the first sentence of the foregoing section as "the guaranty of freedom of publication".

(a) Motion pictures are publications.

An examination of the following authorities will disclose how broad a meaning is given not only in the dictionaries but in decided cases to the words "publish" and publication". It will appear therefrom that the particular agency or medium used, whether it be writing, spoken words, gestures, paintings, drawings, pictures, or motion pictures, is quite immaterial.

The Standard Dictionary—Twentieth Century Edition, page 1443:

Publish:—To make known or announce publicly, as something that otherwise might have remained private or unknown; notify the public of orally, or in writing or printing.

Publication:—Notification to people at large orally or by writing or print.

United States vs. Williams, 3 Fed., 484, at 486:

> "A 'publication' is defined in the dictionaries as a book or writing published, especially one offered for sale or to public notice; and 'to publish' is defined to issue, to make known what before was private, to put into circulation."

2 Bouvier Law Dictionary:

> "The act by which a thing is made public; * * * A libel may be published either by speaking or singing, as where it is maliciously repeated or sung in the presence of others or by delivery, as when a libel or a copy of it is delivered to another. A libel may also be published by pictures or signs, as by painting another in an ignominious manner, or making a sign of a gallows or other reproachful or ignominious sign upon his door or before his house."

United States vs. Loftis, 12 Fed., 671, at 673:

> "A publication is something, as a book or print, which has been published, made public or known to the world. And a writing as well as a printing may be published. What constitutes a publication or a making-public is a question, and must generally depend upon the circumstances of each case."

Pierce & Bushnell Mfg. Co. vs. Werckmeister, 72 Fed. 54:

This was a bill in equity for infringement of a copyright of a painting. The bill alleged publication of the painting on or about September 15th, 1892. The evidence showed that the painting was publicly exhibited in Berlin from January to March, 1892, and at Munich in the summer of 1892. The court held, at page 58, that the public exhibition of this painting constituted a pub-publication within the meaning of the copyright laws.

LeRoy vs. Jamison, 15 Fed. Cases, 373, at 376:

> "In Worcester's dictionary 'publication' is defined as the act of publishing or making public, etc.
>
> In Webster's dictionary the same word is defined as the act of publishing or making known; notification to the people at large either by words, writing or printing.
>
> In Bouvier's Law Dictionary 'publication' is defined as the act by which a thing is made public."

In U. S. vs. Comerford, 25 Fed., 902, at 903, the court quotes the definition from Webster's dictionary, above given.

32 Cyc. 750:

> "Publication. The act by which a thing is made public; the act of publishing or making known; notification to the people at large, either by words, writing or printing; divulgation; that which is published or made known; an act done in public; notifying or printing; proclamation; divulgation; promulgation; issuing; sending out; placing on sale; putting forth; issuing to the public; the act of offering a book to the public by sale or distribution; something—as a book or print—which has been published, made public or known to the world; a book or writing published, especially one offered for sale or to public notice."

The principles announced in the foregoing authorities have also been recognized in the following cases, which dealt specifically with the nature of moving pictures:

Kalem Co. vs. Harper Bros., 222 U. S., 55. At pages 60, 61 and 62, the court spoke as follows:

> "This is an appeal from a decree restraining an alleged infringement of the copyright upon the late General Lew Wallace's Book 'Ben Hur' 169 Fed. Rep., 61, 94 C. C. C. A., 429. The case was heard on the pleadings and an agreed statement of facts, and the only issue is whether those facts constitute an

infringement of the copyright upon the book. So far as they need to be stated here they are as follows: The appellant and defendant, the Kalem Company, is engaged in the production of moving picture films, the operation and effect of which are too well known to require description. By means of them anything of general interest from a coronation to a prize fight is presented to the public with almost the illusion of reality—latterly even color being more or less reproduced. The defendant employed a man to read Ben Hur and to write out such a description or scenario of certain portions that it could be followed in action; these portions giving enough of the story to be identified with ease. It then caused the described action to be performed and took negatives for moving pictures of the scenes, from which it produced films suitable for exhibition. These films it expected and intended to sell for use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title Ben Hur. 'Scenery and supers by Pain's Fireworks Co. Costumes from Metropolitan Opera House. Chariot Race by Third Battery, Brooklyn. Positively the most Superb Moving Picture Spectacle ever Produced in America in Sixteen magnificent Scenes,' etc., with taking titles, culminating in 'Ben Hur Victor.' It sold the films and public exhibitions from them took place.

"The subdivision of the question that has the most general importance is whether the public exhibition of these moving pictures infringed any rights under the copyright law. By Rev. Stat. Sec. 4952, as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106, authors have the exclusive right to dramatize any of their works. So, if the exhibition was or was founded on a dramatizing of Ben Hur this copyright was infringed. **We are of opinion that Ben Hur was dramatized by what was done. Whether we consider the purpose of this clause of the statute, or the etymological history and present usages of language, drama may be achieved by action as well as by speech. Action can tell a story,**

display all the most vivid relations between men, and depict every kind of human emotion without the aid of a word. It would be impossible to deny the title of drama to pantomime as played by masters of act. Daly vs. Palmer, 6 Blachf., 256, 264. But if a pantomine of Ben Hur would be a dramatizing of Ben Hur, it would be none the less so that it was exhibited to the audience by reflection from a glass and not by direct vision of the figures—as sometimes has been done in order to produce ghostly or inexplicable effects. The essence of the matter in the case last supposed is not the mechanism employed but that we see the event or story lived. The moving pictures are only less vivid than reflections from a mirror. With the former as with the latter our visual impression—what we see—is caused by the real pantomine of real men through the medium of natural forces, although the machinery is different and more complex. How it would be if the illusion of motion were produced from paintings instead of from photographs of the real thing may be left open until the question shall arise.

"It is said that pictures of scenes in a novel may be made and exhibited without infringing the copyright and that they may be copyrighted themselves. Indeed it was conceded by the Circuit Court of Appeals that these films could be copyrighted and, we may assume, could be exhibited as photographs. Whether this concession is correct or not, in view of the fact that they are photographs of an unlawful dramatization of the novel, we need not decide. We will assume that it is. But it does not follow that the use of them in motion does not infringe the author's rights. The most innocent objects, such as the mirror in the other case that we have supposed, may be used for unlawful purposes. And if, as we have tried to show, moving pictures may be used for dramatizing a novel, when the photographs are used in that way they are used to infringe a right which the statute reserves."

The decision of the Circuit Court of Appeals for the Second Circuit, which was affirmed by the Supreme Court in the above case, is interesting. It will be found in Harper & Bros. vs. Kalem Co., 169 Fed., 61. At pages 63 and 64 the court spoke as follows:

> "Coming now to the second question: When the film is put on an exhibiting machine, which reproduces the action of the actors and animals, we think it does become a dramatization, and infringes the exclusive right of the owner of the copyrighted book to dramatize it, as well as his right as owner of the copyrighted drama, and of Klaw & Erlanger's right as owners of the performing right publicly to produce it. In other words, the artist's idea of describing by action the story the author has written in words is a dramatization. It is not necessary that there should be both speech and action in dramatic performances, although dialogue and action usually characterize them. Judge Blatchford said on this point, in Daly vs. Palmer, 6 Blachf. 256, Fed. Cas. No. 3,552:
>
> " 'To act, in the sense of the statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking—if such be his part of the play—is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomine is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words.'
>
> And this court, in the case of Daly vs. Webster, 56 Fed., 483, 4 C. C. A., 10, said:
>
> " 'Upon the main point of the case, namely: whether the combination or series of dramatic events (apart from the dialogue) which makes up the particular scene or portion of the play claimed to be infringed is a dramatic composition, and as such entitled to protection under the copyright

laws, it is necessary to add but little to the exhaustive opinion of Judge Blatchford, reported in Daly vs. Palmer, 6 Blachtf. 256, Fed. Cas. No. 3,552. The same scene in the same play is elaborately discussed by him, and in his conclusion that it is a dramatic composition we concur. In plays of this class the series of events is the only composition of any importance. The dialogue is unimportant, and as a work of art trivial. The effort of the composer is directed to arranging for the stage a series of events so realistically presented, and so worked out by the display of feeling or earnestness on the part of the actors, as to produce a corresponding emotion in the audience. Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. It tells a story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative.'

"It can hardly be doubted that, if the story were acted without the dialogue, the performance would be a dramatization of the book; and we think that, if the motions of the actors and animals were reproduced by moving pictures, this would be only another form of dramatization. If the defendant had taken a series of moving pictures of the play as actually performed by Klaw & Erlanger, the exhibition of them would certainly be an infringement of the dramatic composition, because it would tell the story as they tell it, within the decision of Daly vs. Palmer and Daly vs. Webster, supra."

In addition thereto, we would call especial attention to the case of Dailey vs. San Francisco City and County Superior Court, 112 Calif. 94, which held that a theatrical exhibition was a "publication," and as such was entitled to the protection of the guaranty of freedom of publication contained in the California Constitution, which, as will be more fully hereinafter set

forth, is practically identical with the guaranty contained in the Ohio Constitution:

> "The production of a tragedy or comedy upon the theatrical stage is a publication to the world, by word of mouth, of the text of the author, and as to the question here presented to our consideration, it is immaterial whether the words be publicly spoken from the stage or upon the hustings or got out to the world through the channels of the printing press. By the constitutional provision we are about to invoke, a citizen may speak, write or publish his sentiments with equal freedom; and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court, where such trial is pending and in progress, believing such publication would interfere with a due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper. We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon the rights guaranteed to every citizen by Section 9, Article I of the Constitution of the State of California."

We would also refer in this connection to the message of W. J. Gaynor, Mayor of New York City, stating his reasons for vetoing the ordinance creating a censorship for motion pictures in that city, which message is hereinafter referred to at length.

The judges in the court below virtually admitted that the exhibition of motion picture films constituted a **publication**, but did not attach much importance to this fact (See Record, page 64):

> "It can make no difference what its use achieves or constitutes, whether it be a drama, a publication, or even more."

(b) Motion pictures constitute part of "the press" of Ohio within the comprehensive meaning of that word.

The bills of complaint contained the following allegations. (See Record, page 3):

> "That the motion pictures, the films for which are purchased, sold and leased by complainant, depict dramatizations of standard novels and short stories and the performance of standard dramas, many of said novels, stories and dramas being by the world's greatest authors; that they also exhibit many subjects of scientific interest, such as showing the various uses that may be made of electricity, showing the manner of development and growth of various forms of animal and plant life, giving pictures of trips of exploration in the interest of science, of travels in strange lands, and pictures of other subjects covering a range as wide as life itself, which are educational, instructive and amusing.
>
> "That one of the most important classes of subjects exhibited in complainant's motion picture films is the depicting of events of great historical and current interest as they occur throughout the world—the same events which are described in words and by photographs in newspapers, weekly periodicals, magazines and other publications—such historical and current events being, by a well organized system by which photographs are promptly secured thereof, depicted in motion pictures within a few days after they happen; this regular furnishing and publishing of news through the medium of motion pictures being done under the name of the "Mutual Weekly."

New Standard Dictionary, page 1961:

> "Press:—
>
> The newspaper or periodical literature of a country, district, or town taken collectively."

It will appear from the uncontradicted affidavits filed in support of the bills and especially from the affi-

davits of J. E. Hennessy (Record, page 18) and of John Collier (Record, page 48) that the subjects portrayed in appellants' motion pictures cover the entire range of human activity; they deal with nearly every possible subject and are exhibited in nearly every conceivable place.

The mere outline of the classification made by John Collier, General Secretary of the National Board of Censors of Motion Pictures, an organization maintained by voluntary contributions, whose object is to improve the moral quality of motion pictures, indicates what a broad field motion pictures cover. (See Record, pages 48-52):

Scenic and Geographical,
Scientific and Historical,
Mythological,
Educational,
Industrial,
Classical,
Manners and Customs,
Propagandist.

A somewhat more detailed classification of motion picture films belonging to appellants which have been and are being exhibited in the State of Ohio, is given in "Exhibit B" attached to the affidavit of J. E. Hennessy. (See Record, pages 39-43). His classification is as follows:

Animal Life,
Fishing,
Agriculture,
Educational,
Novelty,
Industrial,
Mining,
Dramas,
Staged Plays,
Vaudeville,
Magic,

Allegorical and Mythological,
Religious,
Semi-Religious,
Scenic and Travel,
Nautical,
Historical,
Military and War Dramas,
Sports,
Topical.

On pages 44-47 of the Record in the case of The Mutual Film Company, but not in the record in the case of Mutual Film Corporation will be found an affidavit of Christian M. Christenson making still another classification as follows:

"Roughly speaking, they may be divided into five classes:

1. Films portraying dramatic action made from scenarios specially written; such dramatic action being either the reproduction of dramas, tragedies, comedies or farces. The greater number of films so shown are reproductions of high comedy.

2. Educational films, depicting various scientific facts as they actually occur. Such educational films show the action of electricity, the development of plant life, and of rare specimens of animal life.

3. Historical films, depicting in motion pictures historical events or current events of interest.

4. Special films, made to denote the action of famous and popular novels and of classic literary productions in all languages, such as 'Cymbeline,' 'Romeo and Juliet,' 'Quo Vadis,' 'David Copperfield,' and others too numerous to mention.

5. Films depicting religious subjects, among which may be noted 'The Star of Bethlehem,' 'From Manger to Cross,' 'The Holy City,' 'Life of Moses,' et cetera.

The subjects of motion pictures so exhibited are of such a character that they depict action, as far as possible true to life, and portray human emo-

tions, human sentiments and humane and charitable principles, and, for the most part, teach great principles and treat of morality, resulting in good impressions upon the human mind; or else they are descriptive of scenery, art, travel, scientific invention, and current history, and are amusing, educational and instructive. No immoral, obscene or harmful pictures, so far as I know, are now in circulation among the theatres of Ohio. I keep in close touch with the market and with the product shipped into the state for exhibition, and I believe that I would know if any such immoral or obscene or harmful films were shipped into the state or were exhibited therein. To my knowledge, there are no immoral, obscene or harmful films among those dealt in, purchased, or rented out, by The Mutual Film Company."

Moreover, there will be found in the Record, see pages 19-39, a detailed statement showing week by week the titles of the films which were shown in Ohio as part of appellants' Mutual Weekly between June 2nd and November 25th, 1913.

After examining the several lists of subjects above mentioned this Court may well recall the language used by it in Kalem Co. vs. Harper Bros., 222 U. S., 55:

> "The appellant and defendant, the Kalem Company, is engaged in the production of moving picture films, the operation and effect of which are too well known to require description. By means of them, anything of general interest from a corporation to a prize fight is presented to the public with almost the illusion of reality—latterly even color being more or less produced."

We wish to call the especial attention of the court to the films classified under the head of Propagandist (see Record, page 51). This is not because in appellants' opinion this class is entitled to greater protection under the constitutional guaranty of freedom of publication

than are appellants' other films, but because a consideration of this class brings out sharply the important questions which will arise if censorship of motion pictures is held to be legal. The use of motion pictures for the forwarding of any particular cause is still in its infancy but it is a matter of common knowledge that hardly a day passes without bringing to light some new and original plan for the use of this extremely effective method of reaching millions of people. It is because of the directness of their appeal that motion pictures are certain to play a tremendously important part in the future in the spreading of knowledge and the molding of public opinion upon every kind of political, educational, religious, economic and social question. From even the limited list set forth on page 51 of the Record, it appears that films have been prepared for use in carrying on the following campaigns:

1. Votes for Women.
2. Prohibition.
3. Prison Reform.
4. Suppression of White Slave Traffic.
5. Mormonism.
6. Improvement of poor housing conditions.
7. Fight against Tuberculosis.
8. Use of public schools as social centers.
9. Campaign against Mendicancy.
10. Campaign against use of Egrets on Women's Hats.
11. Anti-Fly Campaign.
12. First Aid.
13. Minimum Wage.
14. Keeping Children in School.
15. Public Play Grounds.
16. Safety First.
17. Campaign for Reconciling the Differences between Capital and Labor.

In impressing upon the minds of the thousands of people who daily witness the exhibition of their motion picture films the arguments made therein for or against any particular cause or propaganda, appellants and those with whom they do business just as certainly form part of the press of the country as do the publishers of newspapers or magazines, or the writers of articles or editorials therein, or the cartoonists or illustrators whose work appears therein.

We shall dwell hereafter more at length upon the evils of censorship and will not therefore digress from our argument in order to do so at this point. It must, however, be obvious that the subjects portrayed in these so-called propagandist films would arouse very different feelings in the minds of any two persons who might witness the exhibition thereof. What one person would from his point of view consider highly moral and educational, another person might consider extremely harmful and even vicious. The personal equation enters so strongly that censorship by any board of censors, however well-meaning, would almost certainly result in an unjust discrimination against some propagandist films which another board equally conscientious and intelligent but holding different views upon political, religious, industrial, social and economic questions would approve without question.

"Quod ali cibus est aliis fuat acre venenum"—
Lucretius IV 637.

"What's one man's poison, signor,
Is another's meat or drink."
Beaumont & Fletcher.

Unless this Court is willing to say that the legislature of Ohio could constitutionally pass an act creating a board of censors to pass upon all articles, cartoons or

photographs appearing in newspapers or periodicals, permitting the approval by the board of "only such articles, cartoons or photographs as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character," (see Record, page 61) and forbidding under a heavy penalty the publication of any articles, cartoons or photographs not so approved—it cannot, we earnestly submit, sustain the censorship of motion picture films.

We would also ask the consideration of the nature of the films which appear, by being thrown upon the screen of course, in the weekly publication known as Mutual Weekly, and which, although partly propandist in character, might more properly be classed simply as the portrayal of items of "news." A complete list covering a period of about five months of the year 1913 will be found on pages 19-39 of the Record. Just at random we select the following typical examples:

JULY 7th, WEEKLY NO. 28.

Record, pages 23-24:

"Fiftieth anniversary celebration of the great three days' Battle of Gettysburg.

White Horse, Canada.
Rock drilling contests on the occasion of King George's birthday.

Paris, France.
The President of the French Republic, Raymond Poincaire, visiting the Cochin Hospital.

Albany, N. Y.
The greatest Knight Templar parade ever held.

Epsom, England.
The Derby.

Philadelphia, Pa.
Hydro-aeronautic tests are made by Aviator Lieutenant Reid and Mayor Blankenburg.

The Fashion in Paris.

Chicago, Ill.
The opening of the new municipal swimming pools, 100,000 small boys and girls enjoy their first plunge.

Washington, D. C.
President Wilson handing message to Fred Reed which is relayed to Chicago by Boy Scouts.

New Rochelle, N. Y.
225th anniversary of the coming of the French Huguenots."

NOVEMBER 3rd, WEEKLY NO. 45.

Record, pages 36-37:

"President Wilson at Commercial Congress.
He visits Mobile and opens a meeting of Southern business men.

The Gordon-Bennett Race.
Start of the annual balloon contest near Paris.

Rough Riding in Dayton, Ohio.
Western broncho buster conquers a wild Zebra.

Freight Handling in Kingston.
The women perform most of the manual labor in Jamaica.

Pegoud Entertains Paris.
Daring aviator continues to perform aerial wonders.

Kids are Kids the World Over.
Jap Boys in public playground in Tokio.

New York's New Mayor.
John P. Mitchel is elected to the highest executive position in the American metropolis.

Paris Fashions.
French designers send us animated record of the latest creations.

Portola Festival, San Francisco.
Western City celebrates 400th Anniversary of Pacific discovery by Balboa.

Glenesslin Piles up on the Rocks.
British ship goes ashore on the Neah-kah-nie Mountain in Oregon with all sails set."

NOVEMBER 17th, WEEKLY NO. 47.

Record, page 38:

"Blizzard clutches Cleveland.
Ohio city isolated for days by terrible storm.

Paris Auto Exposition.
Pres. Poincare opens the fourteenth motor show in the French Capital.

A Royal Wedding.
Prince Arthur of Connaught weds the Duchess of Fife in London.

Christmas in India.
Hindus celebrate the important festival in mosques and in the streets.

Submarine Subway.
New York is sinking her passenger tubes in the Harlem River.

"Texas."
A strong man gave an exhibition of his strength in Portland, Ore.

Freight Handling in Kingston.
The women perform most of the manual labor in Jamaica.

Connaught Leaves England.
Governor General returns to his post in Ottawa, Canada.

Berlin Celebrates.
Great historic parade is held in German City.

A Tug of War.
Utah University students contest for supremacy at Provo.

The Irish Strike.
Soldiers stationed in Dublin compelled to haul their own coal.

A Smash-up in Michigan.
Two engines meet head on at Kalamazoo fair. The auto races."

In portraying events of historical or current news interest from week to week through their Mutual Weekly the appellants are engaged in a business which is in no fundamental respect different from that conducted by newspapers, periodicals, and magazines throughout the world. The Mutual Weekly of the appellants' is as much a press enterprise as are Harper's Weekly, Leslie's Weekly, the Illustrated London News, and countless other periodicals. Indeed, as is specifically alleged in paragraph IX of the bills of complaint, many of the subjects portrayed in motion pictures are "the same subjects which are described in illustrated articles appearing in hundreds of newspapers, periodicals and magazines throughout the United States." In fact many of the pictures which appear in the best known periodicals and magazines are taken from the identical negatives used in making the motion picture films.

It is difficult to understand the justification for compelling Mutual Weekly to submit to the delay, inconvenience and expense, not to mention the probable injustices, incident to the enforcement of the Ohio Censorship Law when newspapers and periodicals are freely permitted to publish photographs and descriptions of events of current interest such as—

> "President Wilson opens the Commercial Congress at Mobile," "Blizzard Clutches Cleveland," "15th Regiment U. S. Cavalry leaves Fort Myer, Va., for Fort Bliss, Texas."

to take three typical films from Mutual Weekly—and there can be no justification unless this court declares that similar burdens of censorship could constitutionally be imposed upon the newspapers and periodicals.

(c) The Ohio Motion Picture Censorship Law is in direct contravention of the guaranty of freedom of publication contained in Section 11 of Article I of the Constitution of Ohio.

Before entering upon a citation of the authorities taken from various jurisdictions which deal with the guaranty of freedom of publication contained in different state constitutions, we would call attention to the fact that while this provision is nearly identical in all of the state constitutions, it is not absolutely so. (See Appendix to this brief.) While the language used in the constitutions of some of the States, for example Massachusetts, is somewhat narrower than that used in the Ohio Constitution, no constitution, so far as we have been able to discover, contains broader language than that used in the first sentence of Section 11 of Article I of the Ohio Constitution:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

This constitutional guaranty was contained in the original constitution adopted by the State of Ohio, 1802, and has been retained through all revisions made since that time. While the number of cases in which the Ohio courts have been called upon to construe this constitutional guaranty have not been numerous, they are valuable and in strict accord with the many other authorities hereinafter cited:

Dopp vs. Doll, 9 Ohio Dec. Rep., page 428:

Headnote:

> "1. It is not within the jurisdiction of a court of equity to restrain by injunction the publication of

an anticipated libel or slander, even though business and reputation is involved, and the intended publisher is insolvent.

"2. An injunction beforehand in such a case would be an abridgement of the freedom of speech and of the press, guaranteed by Art. 1, Sec. 11 of the Bill of Rights in the Constitution of Ohio."

In the course of its opinion the Court cites numerous authorities, both English and American, in support of the foregoing well-established legal principles. The opinion contains the following definition taken from Abbott's Law Dictionary on the term "Liberty of the Press."

"This expression imports freedom from any censorship over what shall be published, exemption from control in advance over the dissemination of ideas by writing or printing. It does not import that one may not be mulcted in damages or punished for what he has published, if after the act it is shown to be contrary to law, but that he should not be restrained beforehand."

Judson vs. Zurhorst, 10 O. C. C. (N. S.) page 289:

Headnote:

"A court of chancery has no jurisdiction to restrain the publication of a lewd, obscene and lascivious pamphlet merely because it is libel, and will injure plaintiff in his reputation and cause the public to believe he is unfit to hold office."

This case was affirmed without report by the Ohio Supreme Court in 78 O. S., page 446.

We wish to make it clear that appellants do not question the right of the State of Ohio to protect its citizens against the exhibition of immoral motion pictures by making it a criminal offense to do so. The Ohio Legislature has already passed a comprehensive act giving its citizens this protection:

Sec. 13040 of the General Code of Ohio:

> "Whoever gives a public or private exhibition of a lascivious, indecent, immoral or impure nature or an exhibition tending to corrupt morals, or owns or operates or permits another to operate on his premises, a phonograph or other device giving forth profane, indecent, immoral or impure language, or owns or operates or permits another to operate on his premises, a picture machine or other device exhibiting a lascivious, indecent, immoral or impure picture or figure or a picture of crime or lust, or a picture tending to corrupt morals, shall be fined not less than fifty dollars nor more than five hundred dollars, and for each subsequent offense, in addition to such fine, shall be imprisoned not less than thirty days nor more than six months."

Appellants do, however, most earnestly contend that they have a constitutional right to exhibit their motion picture films free from any such **previous restraint** as is imposed by the Ohio Censorship Law.

Additional Authorities Other Than Those in the State of Ohio, Upon Freedom of Speech, Freedom of the Press and Freedom of Publication.

There are many phases of our law and particularly of our constitutional law that can only be thoroughly understood after a consideration of their historical development. To understand them we must know what the law of England was when our nation came into existence. While it is true that as to the constitutional guaranties of freedom of speech, freedom of the press and freedom of publication we must consult the history of England, yet, in doing so, we find that the absolute right of freedom of publication, whether by word of mouth or by writing or otherwise, is not a part of the civil and political law of England. In the study of English history we find that

there existed at the time of the adoption of our constitution the very evils which our forefathers in writing our Federal and State Constitutions sought to avoid. We therefore find the first guaranties of freedom of publication and the first expressions as to the freedom of the press in the law of our own country.

Up to the year 1694 the press in England was subject to censorship, Parliament passing acts at stated periods to continue this censorship. The last censorship act expired in 1694 and an attempt to renew it was defeated in 1696 (Green's Short History, pp. 1527, 1528; Paterson, Liberty of the Press, p. 51).

But despite the absence of a licensor or censor of the press, the press was not free in England for a century more and during the whole period of the Revolution and until the formation of our state and federal constitutions the press although free from censorship was subject to a very stringent control. The utterer or publisher or author of any publication could be hailed to court and tried for sedition or libel and the only question submitted to the jury was as to whether or not he was guilty of publishing. Whether the publication was seditious or libelous or violative of law was a matter for the court alone and it was not until 1792 that by the Statute 32 George III. Ch., 60, the right of the jury to determine the law and fact was established in England.

See 2 Taylor, Origin and Growth of English Constitution, p. 492.

We thus see that the right to free publication in England is not and has never been considered an inherent civil or political right; that it is purely the creature of Parliament; that the reason there is no press censor is that since 1694 Parliament has not provided for one, and the reason that publications are free now is because a cen-

tury later, in 1792, Parliament transferred from the court to the jury the right to determine the character of publications. That this freedom of publication is not a part of the fundamental law of England is illustrated negatively by the fact that in the carefully and accurately written histories of the English Constitutional Law there is no word as to freedom of the press. The following books, all accepted authorities, contain no such reference:

Stubbs Select Charters Illustrative or English Constitutional History.
Boutney—English Constitution.
Courtney—The Working Constitution of the United Kingdom.
Bagehot—The English Constitution.

It is only in Mr. Hennis Taylor's American book on the subject that there is reference to the liberty of the press.

We thus see that the provisions in our federal and state constitutions were not derived from the provisions of the law of England at the time of their adoption.

Judge Cooley in his work on Constitutional Law says:

Cooley's Constitutional Law, 3rd ed., Chapter XIV, Section V. Freedom of Speech and of the Press.

> "Freedom of the Press.—De Lolme, who wrote upon the Constitution of England just before the meeting of the Constitutional Convention, and who undertook to gather from the common law the meaning of this among other principles of liberty, has expressed his conclusion thus: 'The liberty of the press as established in England consists in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must in these cases proceed by the trial by jury.' Mr. Justice Blackstone adopted this view as undoubtedly correct, and in this country it has been accepted as expressing the views

of those who framed and adopted this amendment. If it expresses their views fully, we must conclude that the amendment is aimed only at such censorship of the press as had sometimes been exercised in England, and to some extent in the Colonies also, and that, while forbidding this, and leaving every one to publish what he might please, it left him, at the same time, to such responsibility for his publication as the law might provide.

It seems more than probable, however, that the constitutional freedom of the press was intended to mean something more than mere exemption from censorship in advance of publication. Such censorship had never been general in the Colonies: it did not exist at all at the time of the Revolution, and there was no apparent danger of its ever being restored. To forbid it, therefore, and especially just at a time when the people had been taking a larger share in the government into their own hands, and when the command would be laid on their own representatives, would appear to savor somewhat of idle ceremony. But the history of the times shows that the people believed a right of publication existed which might be invaded and abridged by oppressive prosecutions, and by laws which admitted the liberty to publish, but enlarged beyond reason the sphere of responsibility; and the evils they feared had no necessary connection with any established or threatened censorship. * * *

(Page 309.)

Meaning of 'the Press.'—The freedom of the press is not limited to any particular form or method of publication, but it extends to all modes of putting facts, views, and opinions before the public. Books, pamphlets, circulars, etc., are therefore as much within it as the periodical issues."

Commentary on the Constitution of the United States by Joseph Story, 5th ed., Vol. 2, p. 636, section 1882:

"Section 1882. The history of the jurisprudence of England (the most free and enlightened of all

monarchies) on this subject will abundantly justify this statement. The art of printing soon after its introduction, we are told, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was, therefore, regulated in England by the King's procalamations, charters of privilege, and licenses, and finally by the decrees of the court of star chamber, which limited the number of printers and of presses which each should employ and prohibited new publications, unless previously approved by proper licenses. In the demolition of this odious jurisdiction in 1641, the long parliament of Charles I, after their rupture with that prince, assumed the same powers which the star chamber exercised with respect to licensing books; and during the commonwealth (such was the frailty and love of power even in republics) they issued their ordinances for that purpose, founded principally upon a star chamber decree in 1637. After the restoration of Charles II, a statute on the same subject was passed, copied, with few alterations, from the parliamentary ordinances. The act expired in 1679 and was revived and continued for a few years after the Revolution in 1688. Many attempts were made by the government to keep it in force; but it was so strongly resisted by parliament that it expired in 1694, and has never since been revived. To this very hour the liberty of the press in England stands upon this negative foundation. The power to restrain it is dormant, not dead. It has never constituted an article of any of her numerous bills of rights; and that of the Revolution of 1688, after securing other civil and political privileges, left this without notice, as unworthy of care or fit for restraint."

Black's Handbook of American Constitutional Law, 3rd edition, Sec. 247, page 658:

"Section 247. The constitutional guaranty of freedom of speech and of the press forbids any censorship of the press, or any requirement of official

approval or license as a condition precedent to publication.

In England a decree of the court of star chamber limited the number of printers and of presses, and prohibited new publications unless previously approved by proper licenses. After the fall of this jurisdiction, the parliament assumed the same power during the period of the commonwealth, and after the restoration of Charles II. a statute on the same subject was passed founded principally upon the star chamber declaration. This act was continued for some years after the Revolution of 1688. Many attempts were made by the government to keep it in force, but it was strongly resisted by parliament, and it expired in 1694, and has never since been revived.

'To this very hour,' says Story, 'the liberty of the press in England stands upon this negative foundation. The power to restrain it is dormant, not dead. It has never constituted an article of any of her numerous bills of rights; and that of the Revolution of 1688, after securing other civil and political privileges, left this without notice, as unworthy of care or fit for restraint.' As an example of a species of restraint of the press which still exists in England, held perhaps somewhat in the nature of a police regulation, we may mention an act of parliament passed in 1843, which provides that all new plays must be submitted to the lord chamberlain for his examination and approval; and when he shall be of the opinion that it is fitting for the preservation of good manners, decorum, or of the public peace so to do, he may forbid the acting or representation of any such play or part thereof anywhere in Great Britain or in such theatres as he may specify, and either absolutely or for such time as he shall see fit. In the United States, no censorship of the press has ever been attempted or would for a moment be tolerated. It is clearly and indubitably prohibited by the constitutional provisions under consideration."

THE LIBERTY OF THE PRESS, SPEECH AND PUBLIC WORSHIP

BY

JAMES PATERSON, LONDON: MACMILLAN AND CO., 1880.

Page No. 10:

"CHIEF MEDIUM OF THOUGHT IS SPEECH AND WRITING.—And further, before the law can properly deal with those who attack the reputation of others, some notice must be taken of the medium through which this is done. The two leading vehicles of thought are, first and above all others, the faculty of writing or speech; and secondly, printing; but there are other less important means of the same general character, namely, painting or drawing, and any signs and symbols of thought; and even gestures may be employed with like effects. Speech is transitory, and operates only within the range of a limited audience, and perishes with the memory of those who listened.

Writing, as a vehicle of thought, is more durable in its effects, any may circulate beyond the range of the speaker and the hearers; and its influence may be communicated over a wider area. It exists in a stereotyped form, and may be referred to and comprehended by an indefinite number of individuals. Again, printing is only a higher degree of the same mode of publicity, and in its nature, owing to the perfection the art has attained, and the extension of education, tends to circulate over a still wider area—an area which can only be limited by the living generations of man, and not even by these. Painting or drawing in some respects resembles the vehicle of writing and printing, and it may be incorporated in both, or may be circulated by itself in an independent shape, and even a gesture or an attitude may in certain circumstances be as expressive as any

An early appearance of a provision for the freedom of the press which we note in our history is a provision in the Virginia Bill of Rights, adopted 12th June, 1776 (Preston, p. 206). That document, antedating even the Declaration of Independence, declares:

> "XII. That the freedom of the press is one of the great bulworks of liberty and can never be restrained but by despotic governments."

The Pennsylvania Declaration of Rights also adopted in 1776 provided as follows:

> XII. "That the people have a right to freedom of speech and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained."

This was followed by the first amendment to the Constitution adopted in 1789, and by the provisions in the various state constitutions which are collated in the appendix to this brief. So few attempts have been made to restrain the liberty of the press, that in the whole history of this Court, so far as we are aware, but one case involving that question has ever been decided, and that is Patterson vs. Colorado, 205 U. S., p. 454. Nor has any attempt been made directly by the states, with one sole exception to be noted hereafter, to create a censorship of any kind. We therefore have but attempts by litigants or courts to interefere with this freedom to give us the small body of learning that there is on the subject and it may truthfully be said that the first deliberate attempt at censorship of any kind upon intellectual effort in this country is evidenced by the laws here challenged and the other similar laws and ordinances which have been adopted and which are being similarly tested in other courts. (See briefs on motions to advance these causes.)

In an appendix attached to this brief will be found a resume of the history of the provisions in the various state constitutions as to freedom of speech, freedom of the press and freedom of publication. Although expressed in slightly different language, the fundamental principle underlying these constitutional guaranties is the same.

It may be well to observe at this point that the question is not whether or not the framers of our State and Federal Constitution had in mind this particular method of publication by motion pictures at the time when the Constitution was adopted. Obviously they did not, but this fact does not in any way remove this form of publication from the protection of the constitutional guaranty if it is within the spirit thereof.

Hurtado v. California, 110 U. S., 516, page 530.
Boyd v. United States, 116 U. S., 746, 752.
Holden v. Hardy, 169 U. S., 366, 385.
In re Debs, 158 U. S., 164, 591.

Can it be said that in the use of uncircumscribed and unlimited terms, "to speak, write and publish his sentiments on all subjects," the framers of the Ohio Constitution intended to give the broad phrases so used a narrow and technical construction and to include within them only publications by a certain particular agency, namely, printing or writing?

The following authorities establish that neither the legislative nor the judicial branches of the government can through censorship or injunction or by any other means constitutionally impose a previous restraint upon publications, whether these publications be made through the medium of speech, writing, acting on the stage, motion pictures, or through any other mode of expression now known or which may hereafter be discovered or invented.

Cooley's Blackstone, Vol. 2, 4th edition, bottom page 1326:

"The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no **'previous' restraint** upon publications. Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press. But if he publishes what is improper, libelous or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done, both before and since the Revolution, is to subject all freedom or sentiment to the prejudices of one man and make him the arbitrary and inviolable judge of all controverted points in learning, religion and government. But to punish any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order of government and religion—the only solid foundation to civil liberty. Thus the will of individuals is left free. The abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry. Liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials, and to this we may add, that the only plausible argument heretofore used for restraining the just freedom of the press, that it was necessary to prevent the daily abuse of it, will entirely lose its force when it is shown that the press cannot be abused to any bad purpose, without incurring a suitable punishment, whereas, it never can be used to any good one when under the control of an inspector."

The fundamental principles as laid down by the quotation from Blackstone will be found further expressed in the case of Patterson vs. Colorado, 205 U. S.,

454, at p. 462, in which the Supreme Court of the United States, in speaking of the constitutional right of free press and free speech, said:

> "In the first place, the main purpose of such constitutional provisions is **'to prevent all such previous restraints upon publications as had been practiced by other governments,** and they do not prevent the subsequent punishment as such as may be deemed contrary to public welfare.'" (Citing Commonwealth vs. Blanding, 3 Pick., 304, 313, 314; also citing Respublica vs. Oswald, 1 Dallas, 319-25.)

The court further said:

> "The preliminary freedom extends as well to the false as to the true; the subsequent may extend as well to the true as to the false." (Also citing Blackstone, as above quoted.)

In the case of Dailey vs. Superior Court of the City and County of San Francisco, 112 Calif., 94, the California Supreme Court held that the production in a theatre of a play based upon the facts of a criminal case then on trial could not be restrained by injunction—a play being held to be a publication within the protection of the guaranty contained in the California constitution. We call especial attention to this case because the language used in the California constitution is almost identical with that used in the Ohio constitution. At pages 96-97 the court said:

> "The production of a tragedy or comedy upon the theatrical stage is a publication to the world, by word of mouth, of the text of the author, and as to the question here presented to our consideration, it is immaterial whether the words be publicly spoken from the stage or upon the hustings or go out to the world through the channels of the printing press. By the constitutional provision we are about to invoke, a citizen may speak, write or publish his sentiments with equal freedom; and this case now stands before

us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court, where such trial is pending and in progress, believing such publication would interfere with a due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper. We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon the rights guaranteed to every citizen by Section 9, Article I, of the constitution of the State of California. That section provides: 'Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the use and abuse of the right, and no law shall be passed to restrain or abridge the liberty of speach or of the press.' The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. **He shall have no censor over him** to whom he must apply for permission to speak, write or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the censorship was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose."

In the case of Ex Parte Neil, 32 Texas Crim. Ct., 275, the court held that a city ordinance declaring a certain newspaper to be a public nuisance, and prohibiting its circulation in the city limits, was unconstitutional and void. The court said:

"The power to prohibit the publication of news papers is not within the compass of legislative action

in this state, and any law enacted for that purpose would clearly be in derogation of the Bill of Rights.

"A municipal corporation is not invested with power to declare the sale of newspapers a nuisance. * * * The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the constitution must prevail in this state, which clothes the citizen with the liberty to speak, write or publish his opinion on any and all subjects, subject alone to responsibility for the abuse of such privilege."

In Cowan vs. Fairbrother (N. C.), 32 L. R. A., 829, at page 836, the court said:

"When the framers of our constitution declared that the freedom of the press was one of the bulwarks of liberty, and therefore ought never to be restrained, but that every individual should be held responsible for the abuse of the same, they entertained no purpose to restrict the power of any person to dispose of anything of value, which, as the creature of his own mental or physical exertions had become his property. This right is as much a fundamental one as is that to use the press without violation of reasonable laws intended to protect others from libel and slander. In its broadest sense 'freedom of the press' includes not only exemption from censorship, but security against law enacted by the legislative department of the government or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion." (Citing Black, Constitutional Law, pp. 472-3; 3 Story on Constitution, 731; Cooley, Constitutional Limitations, pp. 517-18; Ordronaux, Constitutional Legislation, p. 236 et seq.)

In the case of Ulster Square Dealer vs. Fowler, et al., 111 N. Y. Sup., 16, the court, on page 17, said:

"Much of the matter in the paper published by the plantiff consists of rather harsh and perhaps unjustifiable criticism upon the public and private lives

of some of the citizens of Kingston. The plaintiff has the constitutional right to publish its newspaper and is plainly answerable to the criminal law for the manner in which it avails itself of this right. This is declared in Sec. 8 of Art. I of our constitution, as follows: 'Every citizen may freely speak, write and publish his sentiments on all subjects, being answerable for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.' No one can take unto himself the right of suppressing in advance the publication of the printed sentiments of another citizen on any public or private question."

Life Association of America vs. Davis R. Boogher, 3 Mo. Appeal, at page 173: This was an action, by way of injunction, to restrain the publication of a libel, the petitioner claiming that defendant was threatening to further circulate and publish orally and in print false, slanderous, malicious and libelous statements, for the purpose of libel and blackmail. The court refused the injunction on the ground that it was violative of the constitution. The court in this case speaking by Judge Gantt, said:

"The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right except by the fear of the penalty, civil or criminal, which may wait on abuse. The general assembly can pass no law abridging the freedom of speech or of the press; it can only punish the licentious abuse of that freedom. Courts of justice can only administer the laws of the state, and, of course, can do nothing by way of judicial sentence, which the general assembly has no power to sanction. The matter is too plain for detailed illustration."

In the case of Clothing Company vs. Watson, 168 Mo., l. c. 153, the Supreme Court fo Missouri, in discussing the Bill of Rights, said:

"Section 14 of our Bill of Rights declares that 'no laws shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will, on any subject, being responsible for all abuse of that liberty.' The evident idea of that section is penalty or punishment, and not prevention. Because, if prevention exists, then no opportunity can possibly arise for one becoming responsible by saying, writing or publishing 'whatever he will on any subject.' The two ideas, the one of absolute freedom 'to say, write or publish whatever he will on any subject,' coupled with responsibility therefor, and the other idea of preventing any such free speech, free writing or free publication cannot co-exist. * * *

"That instrument (referring to the constitution) simply forbids any law to be passed impairing the freedom of speech, and then gives a general and perpetual guaranty against any interference from any quarter whatever, with the freedom of every person 'to say, write or publish whatever he will on any subject.' Language could not be broader, nor prohibition nor protection more amply comprehensive.

"Wherever within our borders speech is uttered, writing done, or publications made, there stands the constitutional guaranty giving staunch assurance that each and every one of them shall be free. The legislature cannot pass a law which even impairs the freedom of speech; and as there as no exceptions contained in the rest of the quoted section, the language there used stand as an affirmative proscription against any exception being thereto made as effectually as if words of negation or prohibition had expressly and in terms been employed. * * *

"But the affirmative proscriptions and the general arrangements of the constitution are far more fruitful of restraint upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or dis appoint the purpose of that provision. (Citing Peo ple vs. Draper, 15 N. Y., 544.) * * *

"The expression of one thing in the constitution is necessarily the exclusion of things not expressed. This I regard as especially true of the constitutional provisions, declaratory in their nature. The remark of Lord Bacon, 'That, as exceptions strengthen the force of a general law, so enumeration weakens, as to things not enumerated,' expresses a principle of common law applicable to the constitution, which is always to be understood in its plain, untechnical sense." (Citing Page vs. Allen, 58 Pa. St., 338.)

The court further said in this case:

"The rights then set forth and designated in section 14 are 'excepted out of the general powers of the government; all laws contrary thereto are void, and so long as such provisions of the Bill of Rights continue in force they remain absolute and unchangeable rules of action and decision.' And, as the learned author and eminent jurist just quoted says in an other place with great force: 'The securities of individual right * * * cannot be too frequently declared, not in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the "cob-web chains of paper constitutions."' " Citing 2 Story's const. (Cooley's Ed., Sec. 1938.)

The court further said in this case:

"Nor is it to be forgotten that the right of free speech is also impliedly guaranteed in another section of the Bill of Rights, Section 30, to-wit: 'That no person shall be deprived of life, liberty or property without due process of law.' In other words, free speech is an inevitable concomitant and adjuvant of personal liberty, as necessary to the latter's existence, as vital air to the lungs, or locomotion to the body. Speaking of Section 30, this court, on a former occasion, has said: 'The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary

power in every form which results in the deprivation of a right. These terms, "life," "liberty" and "property," are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil and political; in short, all that makes life worth living; and of none of these liberties can any one be deprived, except by due process of law.'" (Citing State vs. Julow, 129 Mo. loc. cit., 172-3.)

"The probable reason why the rights of free speech, free writing and free publication were mentioned in terms in our organic law, is that in the mother country from whence our institutions were derived, there was scant regard paid to those rights in the country, and a censorship existed over the press, and publication without permission was punished as criminal; and various annoying restrictions over free speech existed, and men were punished by imprisonment for offensive words spoken in debate, even in parliament."

The court in this case cites with approval the case of Dailey vs. Sup. Ct., 112 Cal., 94. The court, in this Watson case, further said:

"Section 14, supra (meaning the constitution), makes no distinction and authorizes no difference to be made by courts or legislatures between a proceeding set on foot to enjoin the publication of a libel and one to enjoin the publication of any other sort or nature, however injurious it may be, or to prohibit the use of free speech or free writing on any subject whatever; **because wherever the authority of injunction begins, there the right of free speech, free writing or free publication ends. No half-way house stands on the highway between absolute prevention and absolute freedom.** The rights established by Section 14 can neither be impaired by the legislature,

nor hampered, nor denied by the court. * * * In short, the exercise of the right of free speech, etc., is as free from outside interference or restriction as if no civil recovery could be had or punishment inflicted because of its unwarranted exercise."

In the case of Atchison, Topeka & S. F. Ry. Co. vs. Brown, 80 Kan., 312, a statute requiring an employer, upon request of a discharged employee, to furnish in writing the true cause or reason for the discharge, was held unconstitutional as violating the Kansas Bill of Rghts:

"All persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right."

The court, on page 315, said:

"It would seem that the liberty to remain silent is correlative with the freedom to speak. If one must speak, he cannot be said freely to speak."

A View of the Constitution of the United States of America by William Rawle, 2nd ed., p. 123, 124:

"The freedom of speech and of the press forms part of the same article, and in part relates to the same subject; it embraces all matters of religious, morals, political, or physical discussion. Tacitus, in gloomy meditation on the imperial despotism of Rome, exclaims: 'How rare are those happy times when men may think what they please and say what they think.' Under the denial of such rights, life is indeed of little value. The foundation of a free government begins to be undermined when freedom of speech on political subjects is restrained; it is destroyed when freedom of speech is wholly denied. The press is the vehicle of the freedom of speech. The art of printing illuminates the world, by a rapid dissemination of what would otherwise be slightly communicated and partially understood. This may easily be conceived, if we were to secure to ourselves the total suppression of printing for even a short time in this country. Our newspapers are now more nu-

merous than such publications are in an equal amount of population in any other part of the world. Whenever a new settlement is formed, and every year presents many such, a printing press is established as soon as a sufficient number of inhabitants is collected. Information is the moral food, for which the native American intellect ever hungers.

But the liberty of speech and of the press may be abused, and so may every human institution. It is not, however, to be supposed that it may be abused with impunity. Remedies will always be found while the protection of individual rights and the reasonable safeguards of society itself form parts of the principles of our government. An obvious superintendency of the press, an arbitrary power to direct or prohibit its publication are withheld, but the punishment of dangerous or offensive publications, which on a fair and impartial trial are found to have a pernicious tendency, is necessary for the peace and order of government and religion, which are the solid foundations of civil liberty."

Because of its singularly terse and vigorous statements of the principles which we have been discussing, we would also ask leave to present to the court the following opinion of Judge W. J. Gaynor as mayor of the City of New York in vetoing on December 27th, 1912, an ordinance providing for the censorship of moving-picture films, passed by the city council of the city of New York:

"I return disapproved the proposed Ordinance No. 89, entitled: 'An ordinance relative to the motion picture theatres.'

I am constrained to do this because of the provisions therein creating a censorship. It is provided that the Board of Education shall appoint one or more censors to examine all motion pictures in advance and determine whether they shall be exhibited or not.

It has hitherto been the understanding in this country that no censorship can be established by law

to decide in advance what may or may not be lawfully printed or published. Ours is a government of free speech and a free press. That is the cornerstone of free government. The phrase 'the press' includes all methods of expression by writing or pictures. In past ages there were censorships to decide what might be published, or even believed. Every Christian denomination has at one time or another been subjected to such censorship. The few were very anxious not to give freedom of speech or of the press. They thought the many were not fit for it. They therefore set themselves up as censors or guardians over the bulk of their fellow men. The center of thought was then among the few, and they were very anxious to keep it there. But in the course of time, in spite of all opposition, the center of thought began to pass from the few to the many, where it is to-day. It was then that censorships, and all interference with freedom of speech, of the press and of opinion, began to give way by degrees, until in the end all of them, at all events, eventually were abolished. And that is now substantially true under all free governments throughout the world.

In our fundamental instrument of government in this country, which we call constitution, we expressly guaranteed from the beginning free speech and a free press, and prohibited the passing of any law abridging the same. The provision in the constitution of this state on that subject, which is substantially the same as the like provision in the constitution of the United States, and also of the states generally, is as follows:

> 'Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.'

So universal has been the opinion that these constitutional provisions abolished all censorship of the press, and forbade them in the future, that I have been able to find only one attempt in this country to

set up such a censorship before this one of yours. Our constitutional provision plainly is that publications, whether oral, or printed, or by writing, or by pictures, shall not be restrained in advance, but that everyone shall be free to speak or publish what he sees fit, subject to being prosecuted afterwards for libel, immorality, obscenity or indecency therefor. There seems to be a few among us who wish to retrace our steps, and resort to censorships again in advance of publication, and make it a crime to publish anything not permitted in advance by the censor. Do they know what they are doing? Do they know anything of the history and literature of the subject? Do they know that the censorships of past ages did immeasurably more harm than good? Do they ever stop to think that such censorships now would do even more harm than they did in past ages; in comparison with what little good they might possibly do? I do not believe the people of this country are ready to permit any censor to decide in advance what may be published for them to read, or what pictures may be exhibited to them. Our laws forbid the publication of any libelous, obscene, indecent, immoral or impure literature or reading matter. Is that not enough? If any one does this he commits a criminal offense and may be punished therefor.

If this ordinance be legal, then a similar ordinance in respect of the newspapers and the theatres generally would be legal. Are you of opinion that you have any such power as that? If so, you should probably begin with the newspapers and the so-called high class theatres. Once revive the censorship, and there is no telling how far we may carry it. These moving picture shows are attended by the great bulk of the people, many of whom cannot afford to pay the prices charged by the theatres. They are a solace and an education to them. Why are we singling out these people as subjects necessary to be protected by a censorship? Are they any more in need of protection by censorship than the rest of the community? That was once the view which prevailed in govern-

ment, and there are some among us ignorant of or untaught by past ages, who are of that view now. Are they better than the rest of us, or worse?

When I became mayor, the denunciation of these moving picture shows by a few people was at its highest. They declared them schools of immorality. They said indecent and immoral pictures were being shown there. I personally knew that was not so. But I had an official examination made of all the moving picture shows in this city. The result was actual proof and an official report that there were no obscene or immoral pictures shown in these places. And that is the truth now. Wherefore, then, is all this zeal for censorship over these places?

The truth is that the good, moral people who go to these moving picture shows, and very often bring their children with them, would not tolerate the exhibition of obscene or immoral pictures there. A place in which such pictures were exhibited would soon be without sufficient patrons to support it. At all events, the criminal law is ample to prevent the exhibition of such pictures. I have asked these people who are crying out against the moving picture shows to give us an instance of an obscene or immoral picture being shown in them, so that the exhibitor may be prosecuted, but they have been unable to do so. What they insist on is to have the pictures examined in advance and allowed or prohibited. That is what they are still doing in Russia with pictures and with reading matter generally. Do they really want us to recur to that system?

Perhaps I should say I understand that comparatively few of your honorable body are in favor of the censorship. Many of you voted for the whole ordinance in the belief that the mayor has the right to veto the censorship provisions and let the rest of the ordinance stand. But I find that the mayor may not do that. The censorship provisions are not independent of the rest of the ordinance, but interdependent and so connected therewith that the whole ordinance must stand or fall as a whole."

(d) The Ohio Motion Picture Censorship Law cannot be sustained upon any ground.

Although the three judges in the court below admitted (see Record, page 63) that "the statute does not make direct provision as to either exhibitors or places," yet they proceeded to consider the act simply as a plan to regulate picture film theatres through a system of granting or withholding licenses. In doing so, they apparently overlooked the very important and uncontraverted point that the theatre is only one of the many places where appellants' films are shown.

In the language of the uncontradicted affidavit of J. E. Hennessy (Record, page 18):

> "Theatres are by no means the only places in which films furnished by complainant to exhibitors within the State of Ohio are exhibited. Complainant's films have been shown not only in theatres but in churches, Sunday schools, Young Men's Christian Associations, Young Women's Christian Associations, public schools, libraries, Chambers of Commerce, jails, reformatories, State Institutions for the Insane, as well as other State Institutions, halls, lodge rooms, factories, store windows, before open air gatherings, such as Chautauquas and political meetings, before medical societies, and, in short, said films have been shown in nearly every conceivable kind of place before gatherings composed of persons of the most widely divergent views upon religious, political, social and economic questions."

The question of freedom of publication which is involved in these cases is too broad a one to be decided upon any narrow theory that the State of Ohio is seeking only to license exhibitions in theatres.

It will undoubtedly be urged by the appellees that however broad the question may be the censorship act is sustainable as a proper exercise of the police power.

We contend that the act cannot be sustained upon this ground because it unquestionably constitutes an invasion of rights secured to the appellants by fundamental law.

However far-reaching the police power vested in the legislature of Ohio may be, it is always subject to the limitation that the legislature may not pass an act which is in direct conflict with any provision of the Constitution of the United States or of the State of Ohio. As was said by the Ohio Supreme Court in the recent case of Board of Health vs. Greenville, 86 O. S., 1, at page 21:

> "It is now the settled law that the legislature of the state possesses plenary power to deal with these subjects so long as it does not contravene the Constitution of the United States or infringe upon any right granted or secured thereby, or is not in direct conflict with any of the provisions of the Constitution of this state, and is not exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression."

The same principles have been recognized in many cases decided by this Court also.

Lawton vs. Steele, 152 U. S. 133, at 137:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, this determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

Mugler vs. Kansas, 123 U. S. 623, at 661:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund Cases, 99 U. S. 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in Marbury vs. Madison, 1 Cranch. 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or if a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

See also:

State ex rel. Hartigan vs. Sperry & Hutchinson Co., 94 Neb., 785.

Many other authorities in support of the same proposition might be cited, but the principle stated in the Greenville case, supra, is so well recognized that it seems

unnecessary to lengthen this brief by doing so. The important question is as to the application of that principle. If, as we believe has been demonstrated in this brief, appellants' motion pictures are entitled to the protection of the guaranty of freedom of publication contained in the Ohio Constitution, then it necessarily follows that the Ohio Legislature cannot, under the police power or under any other power, pass a valid act in direct contravention of the limitations imposed by said constitutional guaranty.

The Ohio Censorship Law Violates the Provisions of Section 1 of Article II of the Constitution of Ohio, in That It Attempts to Delegate Legislative Power.

Paragraph 9 in the assignment of errors relating to this question reads as follows:

> "Said Court erred in refusing to enjoin the enforcement of said Ohio Motion Picture Censorship Law, for the reason that the same violates the provisions of Section 1, Article II of the Constitution of the State of Ohio, in that it attempts to delegate legislative power to the Ohio Board of Censors and to other Boards in Conjunction with which they may work."

Section 1, Article II of the Ohio Constitution provides as follows:

> "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote, as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except

as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."

Even if this Court should hold that the Ohio Legislature has the right to pass a law providing for the censorship of motion pictures, yet the particular act now in force is unconstitutional as being a delegation of legislative power.

It is well-settled law in Ohio as well as elsewhere that legislative power cannot be delegated. It is equally well-settled, we would respectfuly urge, that to attempt to leave to any individual or board the deciding of questions similar to those which arise under the Ohio Censorship Law without the fixing of any definite standard is unconstitutional.

Sections 4 and 5 of the Ohio Censorship Law provide (Record, p. 61):

"Section 4. Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board. They shall be stamped or designated in an appropriate manner and consecutively numbered. Before any motion picture film shall be publicly exhibited, there shall be projected upon the screens the words: 'Approved by the Ohio Board of Censors' and the number of the film."

"Section 5. The Board of Censors may work in conjunction with any censor board or boards of legal status of other states as a censor congress and the action of such congress in approving or rejecting films shall be considered as the action of the board, and all films passed, approved, stamped and

numbered by such congress, when the fees therefor have been paid to the Ohio board, shall be considered approved by such board."

We submit that these sections fix no definite standard whatever—the whole question is left to the judgment and discretion of the Ohio Board of Censors or of some at present non-existent and nebulous censor congress. The Ohio Board of Censors could, under the provisions of Section 5 above quoted, choose to act in conjunction with any censor board of any other State, even though the standards prescribed for such board by the law of the State creating it were entirely different, and could approve or reject films which the censor congress approved or rejected, even though they might be such films as would have passed or failed to meet, as the case might be, the tests imposed by the Ohio Censorship Law. In other words, the manufacturers of, and dealers in, motion picture films have no guide whatever in the Ohio Censorship Law to tell them what standards their films may be called upon to meet.

If the question be asked, What more definite standard could the Ohio Legislature have fixed—we reply that in enacting Section 13,040 of the Ohio Criminal Code, the Legislature came nearer to setting a definite standard. That section reads as follows:

"Whoever gives a public or private exhibition of a lascivious, indecent, immoral or impure nature or an exhibition tending to corrupt morals, or owns or operates or permits another to operate on his premises a phonograph or other device giving forth profane, indecent, immoral or impure language, **or owns or operates or permits another to operate on his premises a picture machine or other device exhibiting a lascivious, indecent, immoral or impure picture or figure or a picture of crime or lust, or a picture tending to corrupt morals**, shall be fined not

less than fifty dollars nor more than five hundred dollars, and for each subsequent offense, in addition to such fine, shall be imprisoned not less than thirty days or more than six months."

The leading Ohio case upon this subject of the non-delegability of Legislative power in Harmon vs. State, 66 O. S., 249. In this case the Supreme Court of Ohio was called upon to consider the unconstitutionality of the so-called Roberts Law, relative to the licensing of steam engineers. The syllabus in the case is as follows:

"The act of March 1, 1900, 94 O. L., 33, entitled 'An act for the better protection of life and property against injury or damage, resulting from the operation of steam engines and boilers by incompetent engineers and others, and to repeal an act therein named,' known as the Roberts Law, is in conflict with the common welfare clause of the Constitution, and also in conflict with Section 2 of the Bill of Rights, and Section 1 of Article II, and is therefore unconstitutional and void."

At Pages 252 and 253 the court spoke as follows:

"Section six of the act is as follows:

"Any person who desires to act as steam engineer, shall make application to any district examiner of steam engineers for a license so to act, upon a blank furnished by the engineer, and if, upon examination, the applicant is found trustworthy and competent, a license shall be granted him, to have charge of, or to operate any steam plant. Such license shall continue in force for one year, unless after proper hearing it is revoked for intoxication or other sufficient cause, the said license to be renewed yearly.

"By this section the examiner is made the exclusive judge as to whether an applicant is trustworthy and competent. **No standard is furnished by the general assembly as to qualification, and no specifications as to wherein the applicant shall be trust-**

worthy and competent, but all is left to the opinion, finding and caprice of the examiner. He is the autocrat with unlimited discretion, without rules prescribing the qualifications of applicants for license, only so that he find them trustworthy and competent. There being six districts and six examiners, each may have his own notions as to what shall constitute an applicant trustworthy and competent, and so there may be in the first instance as many different standards in the state as there are examiners, whereas the standard should be uniform throughout the state. True, by section 9 an appeal is given to the chief examiner from the action of refusing or revoking a license, but here again the power of the chief examiner is supreme and without having rules for his guidance prescribed by the general assembly; the only provision being that if upon investigation he finds that the district examiner was justified in refusing or revoking such license, he shall sustain him, but otherwise he shall order such license to be given.

"Thus allowing the examiner of a district to in effect make the law for his district, limited only by his will as to what shall constitute the standard of the qualification of engineers, is granting legislative power to such examiner, and the appeal to the chief examiner does not change the matter.

"By Section 1 of Article II of the Constitution all legislative power is vested in the general assembly, and this power cannot be delegated to individuals or officers. Mathews vs. Murphy, 63 S. W. Rep., 785.

"Said Section 6 of the Roberts Law is therefore in conflict with said Section 1 of Article II of the Constitution and is void.

"It is urged that this is not legislative but administrative power; but this cannot avail. The constitution does not recognize such a power as administrative power. The constitution provides only for legislative, executive and judicial powers, and what is denominated in some other states as admini-

strative power falls in this state within one of the three great powers recognized by our constitution, legislative, executive and judicial. This court has in several opinions spoken of certain powers as being administrative, but no warrant is found therefor in the constitution, and no necessity exists for such a power, as all powers are included in the legislative, executive and judicial."

So far as we have been able to learn from a careful examination of the reported cases in Ohio, the case of Harmon vs. State, 66 O. S., 249, has never been in any way overruled and still stands as the leading case in Ohio and one of the leading cases anywhere to be found upon the question of delegation of legislative power. An examination of the more recent case of Board of Health vs. Greenville, 86 O. S., 1, and of the other Ohio cases referred to in the opinion of the court below (see Record, page 68) fails to disclose that the case of Harmon vs. State, 66 O. S., 249, was even referred to therein, much less that the Supreme Court intended in any way to depart from the principles announced in the Harmon case.

On the contrary, the case of Harmon vs. State 66 O. S., 249, has been repeatedly recognized in several recent Ohio cases as fixing the law upon the question of delegation of legislative power. Among these cases are the following:

Toledo vs. Winters, 21 Ohio, Dec. 171; 10 N. P. (N. S.), 661.

In this case the Common Pleas Court of Lucas County considered the provisions of an ordinance of the City of Toledo, which provided for the issuing of certificates of registration to persons who desired to do electrical work, said ordinance providing, among other things, as follows:

"and no such certificate shall be issued until the applicant shall have complied with this section, nor shall any such certificate be issued to any applicant believed to be incompetent, and the electrical inspector is hereby authorized to examine any applicant by him believed to be incompetent, for the purpose of showing the fact and to grant and refuse a certificate accordingly."

The court, at page 662, said:

'This act is clearly unconstitutional under the decision of Harmon vs. State, 66 O. S., 249."

Ex parte Sam Lewis, 14 O. N. P. (N. S.), 609, decided August 8th, 1913.

We would call special attention to this case, in which an ordinance of the City of Cincinnati providing for the licensing of operators of moving picture machines was held to be unconstitutional. The syllabus of the case is as follows:

"While a municipality is well within its powers in requiring that operators of moving picture machines shall show themselves to be competent and trustworthy before being permitted to handle so dangerous a mechanism under circumstances which may imperil the lives of an assembly of people, yet an ordinance may have that end in view and still be invalid by reason of failure to provide any standard of qualifications for such operators, leaving the matter of issuing licenses entirely to the judgment or caprice of those authorized to make the examination of applicants."

The court, in reaching its conclusions, followed Harmon vs. State, 66 O. S., 249.

At pages 613, 614 and 615 the court spoke as follows:

"Now, applying the reasoning of the court in that case to the facts in the case at bar, it will be noticed that under this ordinance providing for a

board of examiners of four, these examiners are made the absolute autocrats, with unlimited discretion as to whom they shall issue a certificate, and who they shall say is competent. True, the ordinance provides that the applicant shall be examined and show to the satisfaction of said board that he is fully qualified and competent to operate a moving picture machine; but there is no standard of qualification fixed; there is no provision for an examination upon any subject or subject-matter. Under this ordinance the examination might extend only to the color of the applicant's hair, the appearance of his eyes, or any other physical qualities which he might possess. The examiners might, if they desired, under this ordinance, examine him on conic sections, or integral or differential calculus. They might test his knowledge of the binomial theory, or inquire into his knowledge and learning of the Greek language and the plays of Sophocles. There is no rule prescribed to determine the qualifications of the applicant to operate a moving picture machine, except that he be examined and show to the satisfaction of said board that he is fully qualified and competent to operate such machine.

"Now, the provisions of the Roberts Law, passed upon in the above-cited case, are almost identical with the provision in this ordinance. It is provided therein that the applicant for a license to operate a steam engine shall make his application, and, if upon examination, the applicant is found trustworthy and competent, a license will be granted to him to have charge of or to operate any steam plant. Now, this manifestly means—and the court so found—that if, in the opinion of the district examiner, he was found trustworthy and competent, he should be given a license.

"The council of the City of Cincinnati might have prescribed some subjects upon which the board of examiners should examine an applicant for a license to operate a moving picture machine, but they have failed so to do; and it would appear to the court that the omission of some standard of qualifi-

cation, in the ordinance, makes it fatally defective, under the authority thus cited.

* * * * * * * * *

"The court would be glad to sustain this ordinance as a valid enactment of the council of the City of Cincinnati if a way semed clear to do so under the authority cited. The court recognizes the necessity of regulating the operation of moving picture machines, because of the great danger which accompanies their use and operation, and especially the danger that may follow from their operation by incompetent, unskilled and inexperienced operators.

"The court is well aware there have been very grave disasters which have followed the explosion of films in moving picture theatres, frequently caused by the unskillful operation of those machines, and the council of the City of Cincinnati, it appears to the court, is well within its rights, its powers and its authority when it undertakes to require the operators of such machines to show themselves to be qualified, competent and trustworthy before they shall be permitted to take charge of and operate so dangerous a mechanism as a moving picture machine.

"The defects in this ordinance may very easily be remedied by the council along the same line as the Legislature remedied the Roberts Law. It may be readily ascertained what knowledge, skill and experience the operator of such a machine should have before a license should be granted to him, and when it is ascertained what knowledge, experience and skill he should have, it can very easily be provided in the ordinance that he shall be examined upon the subject-matters which will show his qualification.

"For the reasons stated, the court is of the opinion that the applicant, Sam Lewis, should be discharged from custody at the costs of the respondent."

Since this Court will follow the decisions of the Ohio Courts in construing the provisions of the Ohio Constitu-

tion, it is unnecessary to refer at any great length to decisions in other jurisdictions upon this question of the delegation of legislative power. It may be said in passing, however, that the decision of the Ohio Supreme Court in Harmon vs. State, 66 O. S., 249, and the decisions of other Ohio Courts above mentioned are in accord with many other well-considered cases arising in different jurisdictions, some of which are the following:

Noel vs. People, 187 Ill., 587, at page 591. The facts appear in the following quotation from the opinion:

> "The latter section confers upon the Board of Pharmacy the power in their discretion to issue permits to persons, firms or corporations engaged in business in villages or other localities, empowering them to sell the usual domestic remedies and proprietary medicines under such restrictions as the board may deem proper. It is manifest, that section 8 vests an arbitrary power in the Board of Pharmacy to say who shall, and shall not, sell the usual domestic and proprietary remedies in villages and other localities, and just exactly what they are allowed to sell. Section 8 in no way regulates or controls the discretion vested thereby in the board. The official discretion, conferred upon the board, is unregulated, and not subjected to any permanent provisions operating generally and impartially. No conditions are prescribed, upon which the permit, authorizing the sale of the usual domestic remedies and proprietary medicines, is to be issued. A law, which thus invests any board, or body of officials, with a discretion, which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid. It makes an unjust discrimination between persons coming within the same class. A person, firm or corporation engaged in business in a village or other locality may sell these domestic remedies and proprietary medicines if a permit is obtained from the Board of Pharmacy, provided such board sees fit in its discretion and under such

restrictions as it may deem proper, to issue such permit. The board is thus authorized to confer a privilege upon one person, firm or corporation, and to deny the same privilege to any other person, firm or corporation, and is not required to be governed in doing so by any fixed rules or regulations, but may be moved thereto only by its own caprice, or favoritism. Laws, thus conferring discretionary and arbitrary power upon statutory officials, are not only invalid for the reasons already stated, but amount in effect to a delegation by the legislature of its legislative functions to the board of officials in question. The legislature undoubtedly has the power, in the interest of the public health, to pass a law, regulating the disposition of those domestic remedies and proprietary medicines; but, instead of doing so in section 8, it has abdicated its own power upon the subject, and conferred such power upon the Board of Pharmacy to be exercised according to the discretion of the Board."

Kerr vs. Ross, 5 App. cases District of Columbia, 441:

Under the act of Congress the commissioners of the District of Columbia have power to make regulations regarding plumbing and plumbers. The commissioners created a board of examiners, a license from which board was made necessary in order that any plumber should be allowed to pursue his trade. The matters on which the applicant should be examined and on which their fitness for a license should be judged were, "ability to understand the plumbing regulations; to comprehend and interpret plans and drawings showing the arrangement of pipes and fixtures; to construct house plumbing and drainage in a skillful and workmanlike manner in accordance with plans and specifications; also his knowledge of such common laws of physics and hygiene as have relation to the proper and safe methods of supplying water to building and removing water and

sewage therefrom, and of such other matters as the board shall deem essential to properly qualify him to conduct the business of plumbing."

The plaintiff was refused a license as he would not take the examination, and on application for mandamus to compel the board to issue a license, the court said:

> "The effect of the regulations for examinations here complained of is to delegate to the examiners the discretionary power entrusted to the commission alone which is unwarranted."

To the same effect see

State vs. Burdge (Wis.), 37 L. R. A., 157, at 161.

Mathews vs. Murphy, 63 S. W. Rep., 785.

CONCLUSION.

In presenting this case on behalf of the appellants we have purposely confined ourselves to only the most important of the questions raised by the assignments of errors, because we have wished the better to emphasize to the Court our belief in the importance of these questions. Ohio is not Russia, and censorship as provided in the Motion Picture Censorship Law is directly contrary to one of the fundamenal principles of law embodied in the Ohio Constitution. It is the frank hope of the appellants that this Court may unqualifiedly declare that censorship in any form is unconstitutional. In any event the present law is so palpably defective that it should not be sustained.

Respectfully submitted,

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APPENDIX.

PROVISIONS IN VARIOUS STATE CONSTITUTIONS AND DECISIONS THEREUNDER RELATIVE TO RIGHT OF FREE SPEECH, FREEDOM OF PUBLICATION AND LIBERTY OF THE PRESS.

Alabama:

Constitution, 1819, Art. I, Sec. 8.

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

(No provision re libel).

1861 Art. 1, Sec. 8. Same except that "right is 'liberty.'"

1865 Art. 1, Sec. 5. Same as 1861.

Art. 1, Sec. 13.

"That in prosecutions for the publication of papers investigating the official conduct of officials or men in public capacity or wherever the matter published is proper for public information, the truth thereof may be given in evidence, and that in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the court."

1867 Art. 1, Sec. 6. Free speech provision similar to 1865.

Sec. 1, Art. 14, provision re libel similar to 1865.

1875 Art. 1, Sec. 5. Provision re free speech similar to 1867.

Art. 13, provision re libel similar to 1867.

1901 Art. 1, Sec. 4.

"That no law shall ever be passed to curtail or restrain the liberty of speech or of the press and any per-

son may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Art. 1, Sec. 12. Provision re libel similar to 1875.

Arizona:

1901 Political Code, Sec. 16.

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel the truth may be given in evidence to the jury and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted and the jury shall have the right to determine the law and the facts."

1910 Art. 2, Sec. 6:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

(Nothing re libel).

Arkansas: 1836.

Art. II, Sec. 7:

"The printing presses shall be free to every person and no law shall ever be made to restrain the rights thereof. The free communication of thoughts and opinions is one of the inviolable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

Art. II, Sec. 8. Provision re libel similar to Arkansas.

1864 Art. II, Sections 7 and 8 same as above.

1868 Art. I, Sec. 2:

"The liberty of the press shall remain inviolate forever. The free communication of thoughts and opinions is one of the invaluable rights of man, and all persons may freely speak, write and publish their sentiments on

all subjects, being responsible for the abuse of that right."

"In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted."

1874 Constitution, Art. 2, Declaration of Rights, Sec. 6:

"The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right."

(Provision re libel follows and is similar to 1868).

Constitution, Art. 2, Declaration of Rights, Sec. 6:

"The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the inviolable rights of man and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right."

California:

Constitution 1849, Art. 1, Sec. 9:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Dailey vs. Superior Court, 112 Cal., 94:

Holding that an order of the Superior Court forbidding the representation upon the theatrical stage of the facts of a criminal case pending the trial of such case is an infringement of Section 9 of Article I of the Constitution of the State of California, which protects the rights of the citizen to freely speak, write and publish his sentiments without censorship over him, he being responsible only at the hands of the law for an abuse of that right.

(Page 97.) "The right of the citizen to freely speak, write and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the Constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. * * * (Page 98) Blackstone declares that the liberty of the press consists in laying no *previous restraints* upon publications, and not in freedom from censure for criminal matters when published. He says: 'Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But, if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done before and since the revolution of 1688, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government.' * * *

Story, in his work upon the Constitution, section 1885, declares: 'Indeed, the liberty of the press as understood by the law of England is the right to publish without any previous restraint or license; so that neither the courts of justice nor other persons are authorized to take notice of writings intended for the press, but are confined to those which are printed.'

DeLolme, in his Constitution of England, page 872, declares: 'Liberty of the press consists in this: That neither courts of justice nor any other judges whatever are authorized to take notice of writings *intended* for the press, but are confined to those which are actually printed.' "

Further held that the publication of a libel will not be restrained.

Colorado:

1876 Constitution, Art. 2, Sec. 10:

"That no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty."

(Here follows provision that in all suits and prosecutions for libel, the truth may be given in evidence and the jury, under the direction of the court, shall determine the law and the facts).

Connecticut:

The Constitution of 1776 is silent upon the right to free speech and prosecutions for libel.

1818 Art. 1, Sec. 5:

"Every citizen may freely speak, write and publish his sentiments on all subjects; being responsible for the abuse of that liberty."

Art. 1, Sec. 6:

"No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

Art. 1, Sec. 7 is a provision re prosecutions for libel similar to Colorado.

State vs. McKee, 73 Conn., 18:

(Page 28) "The primary meaning of 'liberty of the press' as understood at the time our early constitutions were formed, was freedom from any censorship of the press; from 'all such previous restraints upon publications as had been practised by other governments and in early times here to stifle the efforts of patriots against enlightening their fellow subjects upon their rights and the duties of rulers.' "

Delaware:

Charter of 1701 is silent on the right to free speech and prosecutions for libel.

Constitution of 1776 is silent on the right to free speech and prosecutions for libel.

Constitution of 1792 same as Constitution of 1831 infra.

1831 Constitution, Art. 1, Sec. 5:

"The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty."

(Here follows a provision re libel similar to Alabama).

Florida:

1838 Art. 1, Sec. 5:

"That every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty; and no law shall ever be passed to control, abridge or restrain the liberty of speech or of the press."

Sec. 15 is a provision re libel similar to Alabama.

1865 Art. 1, Sections 5 and 15 similar to Art. 1, Sections 5 and 15, 1838.

1868 Same as 1885 infra.

1885 Art. 1, Sec. 13:

"Every person may freely speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press."

(Here follows a provision similar to Alabama re libel, except that it provides that the publication must have been made with good motives).

Georgia:

1777 Art. LXI:

"Freedom of the press and trial by jury shall remain inviolate forever."

(No provision re libel).

1789 Art. LXI is re-enacted as Art. IV, Sec. 3.

(No provision re libel).

1798 Art. IV, Sec. 5:

"Freedom of the press and trial by jury as heretofore used in this State shall remain inviolate."

(No provision re libel).

1865 Art. 1, Sec. 6:

"Freedom of speech and freedom of the press are inherent elements of political liberty. But while every citizen may freely speak, or write, or print on any subject, he shall be responsible for the abuse of that liberty."

(No provision re libel).

1868 Art 1, Sec. 9. Provision re free speech similar to 1865.

Sec. 19 provides that in prosecutions for libel the truth may be given in evidence to the jury, which shall determine the law and the facts.

1877 Constitution, Art. 1, Paragraph 15:

"No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

(No provision re libel).

Idaho:

1889 Constitution, Art. 1, Sec. 9:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

(No provision re libel).

Illinois:

1818 Art. VIII. Sec. 22:

"The printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

Sec. 23 is a provision re libel similar to Alabama.

1848 Art. XIII, Sec. 23. Provision re free speech, similar to 1818.

Sec. 24 provision re libel similar to 1818.

1870 Constitution, Art. 2, Sec. 4:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

(Here follows a provision that in prosecutions for libel, if it shall appear that the truth was published with good motives and for justifiable ends, the same shall be a sufficient defense).

Indiana:

1816 Art. 1, Sec. 9:

"That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

Sec. 10, provision re libel similar to Alabama.

1851 Constitution, Art. 1, Sec. 59:

"No law shall be passed restraining the free interchange of thought and opinion or restricting the right

to speak, write or print freely on any subject whatever, but for the abuse of that right every person shall be responsible."

Sec. 10 provides that in prosecutions for libel the truth may be given in justification.

Iowa:

1846 Same as 1857 infra.

1857 Constitution, Art. 1, Sec. 7:

"Every person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

(Here follows provision re libel similar to Arkansas).

Kansas:

1855 Art. 1, Sec. 2:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right and no law shall be passed to restrain or abridge the liberty of speech or of the press."

(Here follows provision re libel similar to Arkansas).

1857 Bill of Rights, Sec. 7:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

(No provision re libel).

1858 Art. 1, Sec. 22. Same as 1855.

1859 Constitution, Bill of Rights, Sec. 11:

"The liberty of the press shall be inviolate and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of that right."

(Provision re libel similar to Arkansas).

Kentucky:

1792.

Art. XII, 7th paragraph. Same as Constitution of 1891 infra.

1799 Art. 10, Sections 7 and 8 same.

1850 Art. 13, Sections 9 and 10 same.

1891 Bill of Rights, Sec. 1, subdivision 4, provides as one of the inalienable rights of the people, "the right of freely communicating their thoughts and opinions."

Sec. 8:

"Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

Sec. 9. This is a provision re libel similar to Alabama.

Louisiana:

1812 Art. 6, Sec. 21. Same provision as Kentucky re free speech. No provision re libel.

1845 Title VI, Art. 110:

"The press shall be free. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

(No provision re libel).

1852 Title VI, Article 106. Same as 1845 re free speech.

(No provision re libel).

1864 Title VII, Article III. Same as 1852.

1868 Title I, Article 4. Same as 1864.

1913 Constitution, Bill of Rights, Art. 3:

"No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Maine:

1819 Constitution, Art. 1, Sec. 4:

"Every person may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty; no law shall be passed regulating or restraining the freedom of the press."

(Here follows a provision re libel similar to Alabama).

Maryland:

1776 Declaration of Rights, VIII. "That freedom of speech and debates, or proceedings in the Legislature ought not to be impeached in any other court or judicature."

XXXVIII. "That the liberty of the press ought to be inviolably preserved."

1851 VIII, above, re-enacted as "8" with "or judicature" changed to "of judicature." XXXVIII above, re-enacted as "38."

1864 Similar to 1867 infra.

1867 Declaration of Rights, Sec. 10. "That freedom of speech and debates, or proceedings in the Legislature ought not to be impeached in any other court or judicature."

Article 40. "That the liberty of the press ought to be inviolably preserved; that every citizen of the state ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."

No provision re libel.

Negley vs. Farrow, 60 Maryland, 158:

(Page 176) "The liberty of the press guaranteed by the constitution is the right belonging to every one, whether proprietor of a newspaper or not, to publish whatever he pleases without the license, interference or control of the government, being responsible alone for the abuse of the privilege. It is a right which from the introduction of the printing press down to the year 1694

did not in England belong to the subject. On the contrary, no one was allowed to publish any printed matter without the license and supervision of the government, and it was against such interference on the part of the government and in favor of the rights of the citizen that this provision found its way into our bill of rights."

Massachusetts:

1780 Constitution, Part The First, Sec. XVI:

"The liberty of the press is essential to the security of freedom in a state. It ought not therefore to be restrained in this commonwealth."

XXI. Provision similar to Sec. 10 of Maryland, supra.

No previous re libel.

Commonwealth vs. Blanding, 3 Pickering, 304:

(Page 313) "Besides it is well understood and received as the commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who uses it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who abuses them for annoyance or destruction."

Commonwealth vs. Kneeland, 20 Pickering, 206:

"It is contended that it is opposed to the Sixteenth Article which provides that 'the liberty of the press is essential to the security of freedom in a state; it ought not therefore to be restrained in this commonwealth.' The obvious intent of this provision was to prevent the enactment of license laws or other direct restraints upon publication, leaving individuals at liberty to print without the previous permission of any officer of government, subject to responsibility for the matter printed * * * The intention of the article in question was to insure the general right of publication at the same time leaving

every citizen responsible for any offense capable of being committed by the use of language, as well when printed as when oral or in manuscript. Any other construction of the article would be absurd and impracticable and inconsistent with the peace and safety of the State and with the existence of free government."

Michigan:

1835 Article I, Sec. 7. Similar to 1908, infra.

No provision re libel.

1850 Article IV., Sec. 42. "No law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right."

No provision re libel.

1908 Constitution, Art. 2, Sec. 4. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Sec. 18. Provision re libel similar to Illinois.

Minnesota:

1857 Constitution, Art. 1, Sec. 3. "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

No provision re libel.

Mississippi:

1817 Art. 1, Sec. 6. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Sec. 7. "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

Sec. 8 provides that in prosecutions for libel the truth may be given in evidence and the jury shall determine the law and facts under the direction of the court.

1832 Art. 1, Secs. 6 and 7. Similar to above.

Sec. 8. Provision re libel similar to Arkansas.

1868 Art. 1, Sec. 4. Provision re freedom of speech similar to 1890, infra.

Provision re libel similar to Arkansas.

1890 Constitution, Art. 3, Sec. 13. "The freedom of speech and of the press shall be held sacred."

Here follows provision re libel similar to Illinois.

Missouri:

1820 Art. XIII., Sec. 16. "That the free communication of thoughts and opinions is one of the invaluable rights of man, and that every person may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

Here follows provision re libel similar to Mississippi.

1865 Art. 1, Sec. 27. Similar to above.

1875 Constitution, Art. 2, Sec. 14. "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that privilege."

Here follows provision re libel similar to Mississippi.

State vs. Van Wye, 136 Missouri, 227, at page 234:

" 'The liberty of the press,' says Lord Mansfield in King vs. Dean of St. Asaph, cited in note to 3 T. R., 431, 'consists in printing without any previous license, subject to the consequence of law.' Lord Ellenborough defines it in Rex v. Corbett, 29 Howell's State Trials, 49, in this way: 'The law of England is a law of liberty and consistently with this liberty we have not what is called

an *imprimatur;* there is no such preliminary license necessary. But, if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal.' * * *

Says Judge Cooley: 'It must be evident from these historical facts that liberty of the press, as now understood and enjoyed, is of very recent origin; and commentators seem to be agreed in the opinion that the term itself means only that liberty of publication without the previous permission of the government which was obtained by the abolition of the censorship.' "

Montana:

1889 Constitution, Art. 3, Sec. 10. "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty."

Nebraska:

1866 Art. 1, Sec. 3. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Here follows provision re libel similar to Arkansas.

1875 Constitution, Art. 1, Sec. 5. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

Here follows provision re libel similar to Arkansas, except that it is made to apply to civil and criminal cases.

Nevada:

1864 Constitution, Art. 1, Sec. 9. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to re-

strain or abridge the liberty of speech or of the press."

Here follows provision re libel similar to Arkansas.

New Hampshire:

1776 Silent on both subjects.

1784 Art. 1, Sec. XXII. and XXX. Similar to 1792, infra.

No provision re libel.

1792 Constitution, Part First, Sec. 22. "The liberty of the press is essential to the security of freedom in this state; it ought therefore to be inviolably preserved."

Sec. 30. "The freedom of deliberation, speech and debate, in either house of the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any action in any other court or place whatsoever."

Re-enacted 1846, 1894.

No provision re libel.

New York:

1777 Silent on both subjects.

1821 Art. VII. Sec. 8. Similar to 1894, infra.

1846 Similar to 1894, infra.

1894 Constitution, Art. 1, Sec. 8. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Here follows provision re libel similar to Arkansas and providing that the jury shall be the judges of the law and the facts.

Marlin vs. Shields, 171 N. Y., 384, at page 391:

"The constitutional guaranty of freedom of speech and press, which in terms provides that 'every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press' (State Constitution, Art. 1, Sec. 8), has for its only limitations the law of slander and libel. Hitherto freedom of speech and of the press could only be interfered with where the speaker or writer offended against the criminal law or where the words amounted to a slander or libel of a person or corporation or their property, and the guaranteed right of trial by jury entitled the parties accused of slander or libel to have twelve men pass upon the question of their liability to respond in damages therefor and to measure such damages. But the precedent which the plaintiff seeks to establish would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require, and in case of the violation of the provisions of such a decree the usual course and practice of equity would necessarily be invoked, which would authorize the court to determine whether such published articles were contrary to the prohibitions of the decree, and if so found punishment for a contempt might follow. Thus a party could be punished for publishing an article which was not libelous and that too, without a trial by jury. * * *

It was long ago held in this state that a Court of Chancery has not jurisdiction to restrain the publication of a libel by injunction upon a bill filed by a party whose character or business will be injured by the publication."

(The above action was brought to restrain the unjust and malicious criticisms of a manufactured article published in a magazine. It was admitted that there was no adequate remedy at law because special damage could not be proved.)

New Jersey:

1776 Silent on both subjects.

1844 Similar to 1897, infra.

1897 Constitution, Art. 1, Sec. 5. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

Here follows provision re libel similar to New York.

New Mexico:

1846 Kearney, Bill of Rights, Sec. 12. "That free communication of thought and opinion is one of the inviolable rights of every man and that every person may freely speak, write or print on any subject, being responsible for every abuse of that liberty."

No provision re libel.

Ohio:

1802 Art. 8, Sec. 6. "That the printing presses shall be open and free to every citizen who wishes to examine the proceedings of any branch of government or the conduct of any public officer; and no law shall ever restrain the right thereof. Every citizen has an undisputable right to speak, write or print upon any subject as he thinks proper, being liable for the abuse of that liberty."

Here follows provision re libel similar to Alabama.

1851 Constitution, Art. 1, Sec. 11. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge liberty of speech, or of the press."

Here follows provision re libel similar to Arkansas.

1912 Sec. 11, Art. 1. "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

North Dakota:

1889 Constitution, Art. 1, Sec. 9. "Every man may freely write, speak and publish his opinion on all subjects, being responsible for the abuse of that privilege."

Here follows provision re libel similar to New York.

North Carolina:

1776 Declaration of Rights, Sec. XV. "The freedom of the press is one of the great bulwarks of liberty and should therefore never be restrained."

No provision re libel.

1868 Similar to 1876.

No provision re libel.

1876 Constitution, Art. 1, Sec. 20. "The freedom of the press is one of the great bulwarks of liberty and ought therefore never to be restrained, but every individual shall be held responsible for the abuse of the same."

No provision re libel.

Oklahoma:

1907 Constitution, Art. 2, Sec. 22. "Every person may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Here follows provision re libel similar to Arkansas.

Oregon:

1859 Constitution, Art. 1, Sec. 8. "No law shall be passed restraining the free expression of opinion or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of that right."

No provision re libel.

Pennsylvania:

1681 Concession to Province of Pennsylvania. Silent on both subjects.

1682 Frame of Government of Pennsylvania. Silent on both subjects.

1683 Frame of Government of Pennsylvania. Silent on both subjects.

1696 Frame of Government of Pennsylvania. Silent on both subjects.

1701 Charter of Privileges. Silent on both subjects.

1776 Declaration of Rights, XII. "That the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained."

XXXV. "The printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any part of government.

No provision re libel.

1790 Art. IX, Sec. 7. Provision re freedom of speech similar to 1874, infra, with libel provision similar to Alabama.

1830 Similar to 1874, infra.

1874 Constitution, Art. 1, Sec. 7. "The printing press shall be free to every person who may undertake to examine the proceedings of the legislature or any branch of government and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

No conviction shall be had in any prosecution for the publication of papers relating to the official misconduct of officers or men in public capacity or to any other matter open for public investigation or information when the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury."

The jury shall determine the law and the facts under the direction of the court.

Rhode Island:

1842 Constitution, Art. 1, Sec. 20. "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty * * *."

Here follows provision re libel to the effect that the truth shall be a sufficient defense unless the publication was malicious.

South Carolina:

1669 Fundamental Constitution of Carolina. Silent on both subjects.

1776 Silent on both subjects.

1778 XLIII. "That the liberty of the press be inviolably preserved."

No provision re libel.

1790 Art. VII continued in effect all preceding laws then in force; otherwise silent on both subjects.

No provision re libel.

1865 Article VIII continued in effect all preceding laws not repugnant; otherwise silent on both subjects.

1868 Art. 1, Sec. 7. "All persons may freely speak, write and publish their sentiments on any subject, being responsible for the abuse of that right; and no laws shall be enacted to restrain or abridge the liberty of speech or of the press."

Sec. 8 provides that in libel prosecutions relating to public men or matter of public interest, the truth may be given in evidence and the jury shall be the sole judges of the law and the facts.

1895 Constitution, Art. 1, Sec. 4. "The General Assembly shall make no law respecting the establishment of religion or prohibiting the free exercise thereof or abridge the freedom of speech or of the press * * *."

Sec. 21. Provision re libel similar to Colorado.

South Dakota:

1889 Constitution, Art. 6, Sec. 5. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

Here follows provision re libel similar to Arkansas.

Texas:

1824 Constitution of United Mexican States. Silent on both subjects.

1827 Provisional Constitution of Texas. Silent on both subjects.

1838 Declaration of Rights, Sec. 4. Free speech provision similar to 1876, infra, and libel provision similar to Missouri.

1845 Art. 1, Sec. 5. Free speech provision similar to 1876 and libel provision similar to Alabama.

1866 Art. 1, Sec. 5. Free speech provision similar to 1876 and libel provision similar to Alabama.

1868 Art. 1, Sec. 5. Free speech provision similar to 1876 and libel provision similar to Alabama.

1876 Constitution, Art. 1, Sec. 8. "Every person shall be at liberty to speak, write or publish his opinions on any subject being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

Here follows provision re libel similar to Alabama.

Morton vs. The State, 3 Texas Ct. of Appeals Rep., 510:

(Page 516) "Mr. Blackstone says that 'in passing laws in regard to libels and punishing libelers * * * the liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but, if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. * * * Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint thereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left. The disseminating or making public of bad sentiments destructive of the ends of society

is the crime which society corrects. * * * And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press 'that it was necessary to prevent the daily abuse of it' will entirely lose its force when it is shown (by a seasonable exertion of the law) that the press cannot be abused to any bad purpose without incurring a suitable punishment, whereas it never can be used to any good one under the control of an inspector."

Tennessee:

1796 Art. XI, Sec. 19. Similar to 1870, infra.
Provision re libel similar to South Carolina.

1834 Similar to 1870, infra.

1870 Constitution, Art. 1, Sec. 19. "That the printing presses shall be free to every person to examine the proceedings of the legislature or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

Here follows provision re libel similar to South Carolina.

Utah:

1895 Constitution, Art. 1, Sec. 1. "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protect against wrongs and petition for redress of grievances; to communicate freely their thoughts and opinions; being responsible for the abuse of that right * * *."

Here follows provision re libel similar to Arkansas.

Vermont:

1777 Chap. 1, Sec. XIV. "That the people have a right to freedom of speech and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained."

1786 Chap. 1, Sec. XV and XVI. Similar to 1793.

1793 Constitution, Chap. 1, Art. XIII. "That the people have a right to freedom of speech and of writing and publishing their sentiments concerning the transactions of government and therefore the freedom of the press ought not to be restrained."

XVI. "The freedom of deliberation, speech and debate in the legislature is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action or complaint in any court whatever."

No provision re libel.

Virginia:

1776 Bill of Rights, Sec. 12. "That the freedom of the press is one of the great bulwarks of liberty and can only be restrained by despotic government."

No provision re libel.

1830 Bill of Rights of 1776 considered as prefixed. Article III, Sec. 11. Similar to Sec. 12, 1902, infra.

No provision re libel.

1850 Same as 1776.

No provision re libel.

1864 Same as 1830.

No provision re libel.

1870 Similar to 1902, infra.

1902 Constitution, Art. 1, Sec. 12. "That the freedom of the press is one of the great bulwarks of liberty and can only be restrained by despotic governments; and any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

Art. IV, Sec. 58. "The legislature shall pass no law abridging freedom of speech or of the press."

No provision re libel.

Washington:

1889 Constitution, Art. 1, Sec. 5. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

No provision re libel.

West Virginia:

1861 Art. 2, Sec. 4. Similar to 1872, infra.

Sec. 5. Provision re libel similar to Florida.

1872 Constitution, Art. 3, Sec. 7. "No law abridging the freedom of speech or of the press shall be passed, but the legislature may by suitable penalties restrain the publication or sale of obscene books, papers or pictures and provide for the punishment of libel and defamation of character and for the recovery in civil actions by the aggrieved party of suitable damages for such libel or defamation."

Sec. 8. Provision re libel similar to Florida.

Wisconsin:

1848 Constitution, Art. 1, Sec. 3. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

Here follows provision re libel similar to Florida.

Wyoming:

1889 Constitution, Art. 1, Sec. 20. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

Here follows provision re libel similar to Arkansas.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 597.

MUTUAL FILM CORPORATION OF MISSOURI,
Appellant,

vs.

GEORGE H. HODGES, GOVERNOR; CHARLES H. SESSIONS, SECRETARY OF STATE; JOHN S. DAWSON, ATTORNEY GENERAL, AND W. D. ROSS, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF KANSAS,
Appellees.

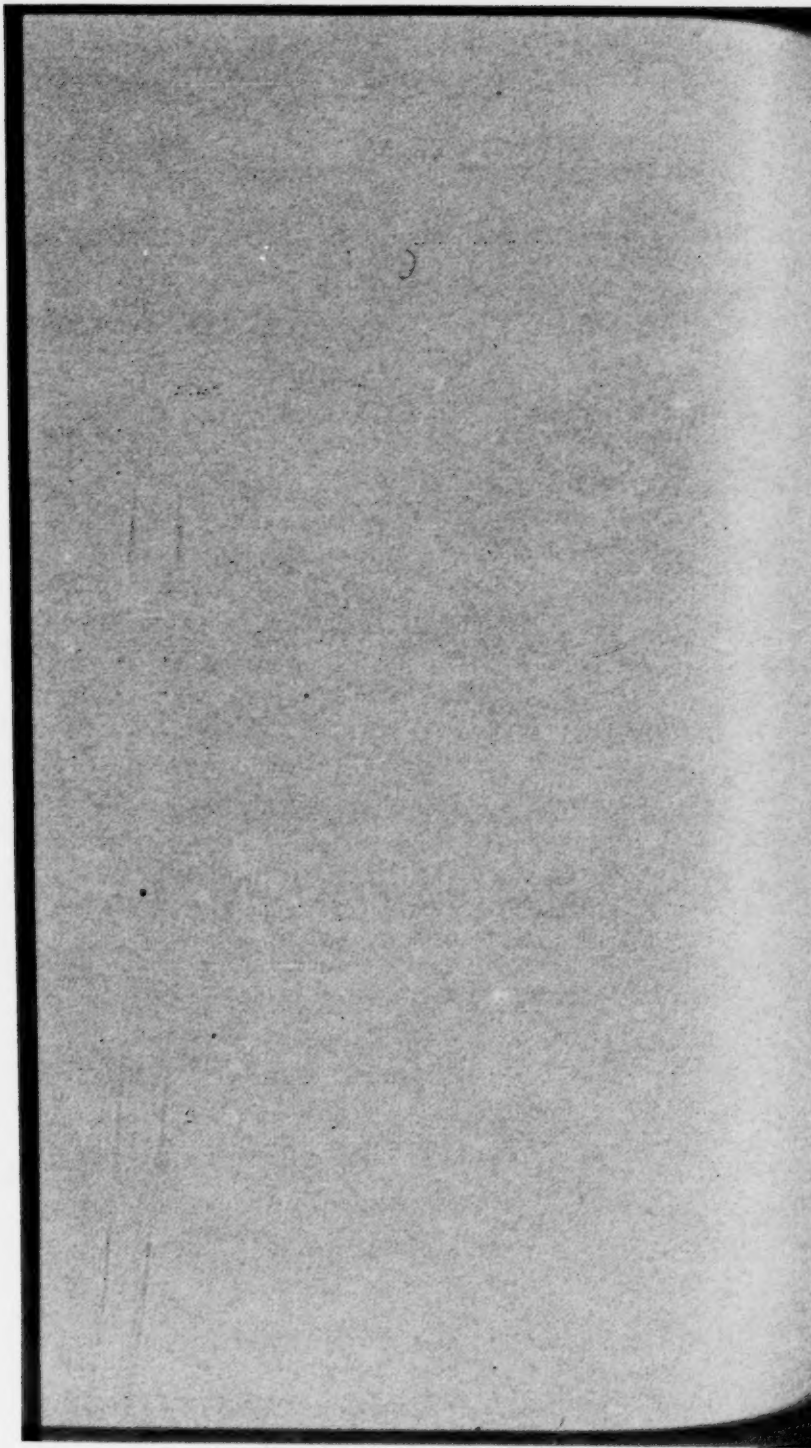
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

REPLY BRIEF OF APPELLANT, MUTUAL FILM CORPORATION OF MISSOURI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

MUTUAL FILM CORPORATION OF MISSOURI, *Appellant*, *against* GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN S. DAWSON, Attorney General, and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas, *Appellees.*	No. 597.

REPLY BRIEF OF APPELLANT.

The distinguished counsel for the appellees has presented to the Court in support of his position certain statements and propositions of law that demand a reply, and in this brief appellant's counsel will strictly limit themselves to comment upon matter in the appellee's brief not covered by the main brief for the appellant.

The matters requiring reply are as follows:

1. Statements in the brief for the appellees concerning the necessity for censorship of motion picture films because of immorality.

2. Failure to understand the real basis for the Court's jurisdiction in this case.

3. Failure to understand appellant's contentions as to the police power and as to the reasons why the statute in question is not within the police power of the State.

In presenting this branch of the argument to the Court, appellant will present three affirmative propositions referring respectively to the three matters above mentioned;—viz:

1. There is nothing in the record and nothing in fact to warrant the inference that motion picture films are as a class or in isolated instances dangerous to the morals of the community; and the Court should not take judicial notice of matters founded in prejudice and not in fact.

2. Appellant's interstate business would be seriously damaged by the enforcement of the statute, and it has established facts warranting the exercise of jurisdiction upon several grounds.

3. The police power is not an unlimited power, but a power broad in scope, but strictly limited by the written Constitution, and the statute in question, in so far as it violates the Constitution, is in excess of the police power.

I.

There is nothing in the record and nothing in fact to warrant the inference that motion picture films are as a class or in isolated instances dangerous to the morals of the community; and the Court should not take judicial notice of matters founded in prejudice and not in fact.

Appellant made a deliberate attempt in the Court below to lay the prejudice which has been raised against motion pictures. It was thought that by categorically making the statement that there were no immoral or improper pictures in existence, contradiction would be challenged, and this issue would be disposed of.

The affidavit of Nathanson (fol. 41) raises this question, describes specifically typical subjects of films, and then at folio 44 shows why indecent or improper films do not exist.

The affidavit of Hall (fol. 50) also shows the character of the films.

In the Court below, the defendants did not challenge these statements by pleading, proof nor argument, and yet we find the learned Attorney General at page 51 of his brief, stating that if the statute be condemned, "there would be nothing in the way of flooding Kansas with picture films or reels of the most injurious and degrading type that are lying in wait for the law that puts them on the shelf to be declared unconstitutional by this honorable Court."

If no motion picture films had ever existed in Kansas before this law was adopted, a statement

of this character might be worthy of attention, but motion pictures were known before the censorship law was passed, and yet the appellees did not feel compelled to offer any specific criticisms nor to excuse their failure to do so.

There was a law in Kansas before this statute was adopted which did punish the sale or dealing in or exhibition of improper pictures, and that law is on the statute books today (*General Statutes of Kansas*, Dassler, 1909, *Sections* 2844-2847 inclusive).

There is no statute providing for the censorship of books coming into Kansas, nor for the censorship of picture postal cards, nor for the censorship of newspapers, and yet we all know that Kansas is not flooded with harmful or immoral books or picture postals or newspapers. There is no law for the censorship of theatrical exhibitions in Kansas, yet we all know that indecent public exhibitions are non-existent. The motion picture business is new, and like many new things, is the victim of prejudice. It seems to be a characteristic of human nature to suspect what is new, and since the development of motion pictures is recent, they have been the subject of suspicion and of unfounded attack similar to that made in the brief for the appellees. Perhaps, the members of this honorable Court are familiar with some of these attacks, but they are baseless, and the appellant respectfully urges upon the Court that it do not take judicial notice of the statements of detractors of the motion picture business as if they were facts.

The late Mayor Gaynor in his very interesting message vetoing a censorship ordinance in New York said (see main brief, page 58):

> "When I became Mayor, the denunciation of these moving picture shows by a few

> people was at its highest. They declared them schools of immorality They said indecent and immoral pictures were being shown there. I personally knew that was not so. But I had an official examination made of all the moving picture shows in this city. The result was actual proof, and an official report that there were no obscene or immoral pictures shown in these places. And that is the truth now. Wherefore, then, is all this zeal for censorship over these places?''

We lay much stress upon this matter of fact because it is important to the appellant that its business be properly classified by the Court, and that the prejudices of the last few years which are now quickly disappearing, be not made the basis for assumptions without foundation in fact.

II.

Appellant's interstate business would be seriously damaged by the enforcement of the statute, and it has established facts warranting the exercise of jurisdiction upon several grounds.

The facts in this case with reference to the nature of appellant's business need but be stated to show appellant's rights here. The bill of complaint (third paragraph, fol. 3) which is admitted (answer, paragraph 3, fol. 24) shows that the plaintiff's business is a rental business. The affidavit of Hall (fol. 45) shows why appellant rents its films rather than sells them, and (fol. 47)

shows that appellant's business is the renting of films from its office in Kansas City, Mo., throughout the States of Missouri, Arkansas and Kansas, and (fol. 52) shows further that the same reels of film rented out to customers in Kansas are rented out to exhibitors in Missouri and Arkansas. The affidavit of Nathanson (fol. 39) shows in a little greater detail, how the rental business is conducted, and we thus see that appellant's business consists of renting films to various exhibitors, some in Kansas, some in Arkansas, and some in Missouri; that films are shipped into Kansas, exhibited there and returned to appellant, which uses them elsewhere. Throughout the transaction the films are appellant's property. It is not as if appellant sold its merchandise. Then, some question of "original package" might be raised. But it is appellant's own property which is to be subjected to this illegal censorship.

To the suggestion that the law imposes no duty upon film exchanges but simply upon exhibitors, the record and the appellees' admissions furnish a complete reply. It is alleged in the bill of complaint (paragraph 16, fol. 7) that by reason of the nature of the business, the film exchanges must bear the burden of censorship. In the answer (paragraph 14, fol. 28) the appellees admit that expedition, simplification and convenience in the administration of the law require that the film exchanges take care of the censorship of films, and the uncontradicted affidavit of Hall shows that because duplicates of the same films come into the State from various sections, it would not be practicable for any but the film exchanges—the clearing houses—to take care of the censorship (Hall affidavit, page 27, fols. 48-49).

We thus have the simple case of a complainant, a corporation of Delaware, doing business in Mis-

souri, whose property is constantly in transit between Missouri and Kansas. This property cannot be used in Kansas unless the law attacked is complied with, unless that law be declared invalid. It is hard to conceive of a more direct interest. Merely because this is a new species of intercourse, does not deprive it of the character of commerce.

Pensacola Telegraph Co. vs. *Western Union Telegraph Co.*, 96 U. S., 1, 9.
International Text Book Co. vs. *Pigg*, 217 U. S., 91, 106.

This Court has never permitted itself in protecting interstate commerce, to be limited by narrow or arbitrary definitions, and we cite as excellent examples of cases defining interstate commerce in the broadest of terms, the following few:

Caldwell vs. *North Carolina*, 187 U. S., 622, holding that where pictures and frames were shipped into the State of North Carolina, where they were unpacked and the frames put on pictures and then delivered to purchasers, that the transactions still were protected as interstate commerce.

Savage vs. *Jones*, 225 U. S., 501, where the complainant in Minnesota sold his merchandise to purchasers in Indiana and lost all title to his merchandise, and yet the transaction was held interstate commerce.

International Text Book Co. vs. *Pigg*, 217 U. S., 91, holding the activities of the international correspondence schools to be commerce.

Regardless of any other question in the case, if

the statute attacked does no more than to make illegal exactions of appellant's customers, the appellant being engaged in interstate commerce is entitled to challenge the validity of the law.

III.

The police power is not an unlimited power, but a power broad in scope, but strictly limited by the written constitution, and the statute in question, in so far as it violates the constitution, is in excess of the police power.

The attempt to justify usurpation by resort to an alleged exercise of the police power is becoming all too familiar to the Courts, and has recently earned the comment of this Court.

> "Nor does the fact that the law now in question was alleged to have been passed in the exercise of the police power of the State make it lawful." *Crenshaw* vs. *Arkansas*, 227 U. S., 389, 399.
>
> "The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power." *Kansas Southern Railway* vs. *Kaw Valley Drainage District*, 233 U. S., 75, 79.

As clear a statement as has ever been made of the limitations of the police power is to be found in *Mugler* vs. *Kansas*, 123 U. S., 623, 661:

> "If, therefore, a statute purporting to have been enacted to protect the public

> health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

The contention, therefore, that because the Legislature deemed the statute wise or necessary its judgment is unimpeachable (Appellees' brief, page 53) is clearly unsound, for the Legislature has no right to pass a law violative of the constitutional guaranties.

In our main brief, we have discussed at length the basic constitutional question involved, and we shall devote but a few words to comment upon certain of the contentions of the appellees.

It is said that the law in question is necessary for the protection of children. The State of Kansas has upon its statute books a number of statutes designed to protect children from corruption.

> See *General Statutes of Kansas*, Dassler, 1909, *Sections* 5130-5136.

Other States, notably the State of New York, have deemed it wise to forbid the attendance of minors under certain ages at public shows unless accompanied by their parents or guardians, and Kansas could easily adopt a similar statute which would be perfectly valid. The law is rigorously enforced in New York, as court records will show.

As noted above, Kansas has also passed comprehensive statutes forbidding obscene and other improper exhibitions and publications.

> *General Statutes Kansas*, Dassler, 1909, *Sections* 2844-2847.

It is interesting to note that Section 2847 provides a statutory definition of publication quite

in harmony wih the definition of publication advanced by appellant.

The very ingenious argument advanced by the appellees that this statute is in some way auxiliary to the system of education adopted by the State of Kansas is, upon analysis, specious. In the first place, if the standard for the protection of minors is to be the standard of the Board, then all adults visiting motion picture shows will be prevented from seeing anything but what is good for children. There are many books, many pictures, many newspapers, many speeches, many sermons, which may be sources of real inspiration to adults, but of naught but confusion of mind to children. This is equally true of motion pictures. Take even the few subjects mentioned in the Nathanson affidavit (fols. 41-44). Is it not conceivable that "Romeo and Juliet," "Jess," "Merchant of Venice" and "Virginius" might all be misunderstood by children? Rumor has it that anti-semitism has been stimulated in the schools by the reading of the "Merchant of Venice." Might not the defendants reject that as a harmful film?

The proper way for the State to protect and educate its children is to keep them away from stimuli fit only for adults, and the same logic which requires the censorship of motion pictures would also demand the censorship of newspapers, pictures, books and all classes of publications. This branch of the appellees' argument but reenforces appellant's contention that the statute violates the letter and the spirit and the true meaning of the constitutional guaranty of free speech.

Of the many authorities referred to in appellees' brief, two seem to be particularly stressed by lengthy and repeated quotations. The first is *Meffert* vs. *Medical Board*, 66 Kansas, 710. This

is quoted as defining the police power, but what was really decided in the case was very simple, and the language of the opinion if referred to the facts, cannot be misunderstood. The law of Kansas provided that a physician's license could be revoked for immorality. Meffert was a physician. He was charged with immorality before the Medical Board. Copies of the charges were served upon him. There was a hearing at which he was represented by counsel and introduced evidence. Substantial justice was done, and there was no claim of anything but perhaps a failure on the part of the Medical Board to proceed according to technical legal rules. The Court held that Meffert had not been deprived of due process of law; that he had no such absolute right to practice medicine as he claimed. This case has nothing to do with censorship at all.

Bock vs. *City of Chicago*, 239 Ill., 251, was the case involving the motion picture film censorship ordinance of the City of Chicago. The constitutional questions raised in the case at bar were not touched upon either in the arguments of counsel or in the opinion of the Court. It cannot be said that they were overlooked because they were never in any way raised nor suggested. Under the circumstances, the case is no authority against the specific contentions of the appellant in this cause.

On this branch of the case, then, we sum up by saying that the police power is not an absolute unlimited power, but that it is limited by the Constitution.

Mr. Freund says in his work on Police Power, *Section* 18:

> "*Sec. 18. Specific limitations upon police legislation.*—The constitutional limitations upon police legislation are partly specific

> and partly general. The principal specific limitations are directed against legislation establishing a religion or forbidding its free exercise, abridging the freedom of speech and press, and assembly, restraining the right to keep and bear arms, and authorizing unseasonable searches and seizures."

The statute here attacked is invalid because it violates the specific limitation of the police power against legislation abridging the freedom of speech and press and assembly, and for that reason, the judgment appealed from should be reversed.

Respectfully submitted,

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WILLIAM B. SANDERS,
HAROLD T. CLARK,
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No. 303

In the Supreme Court of the United States

OCTOBER TERM, 1914

THE MUTUAL FILM CORPORATION OF ILLINOIS, Appellant,

vs.

GEORGE E. HODGES, Governor, CHARLES S. SESSIONS, Secretary of State, JAMES E. DAY, Attorney-General, and T. J. DUNN, Superintendent of Public Instruction, of the State of Illinois, Appellees.

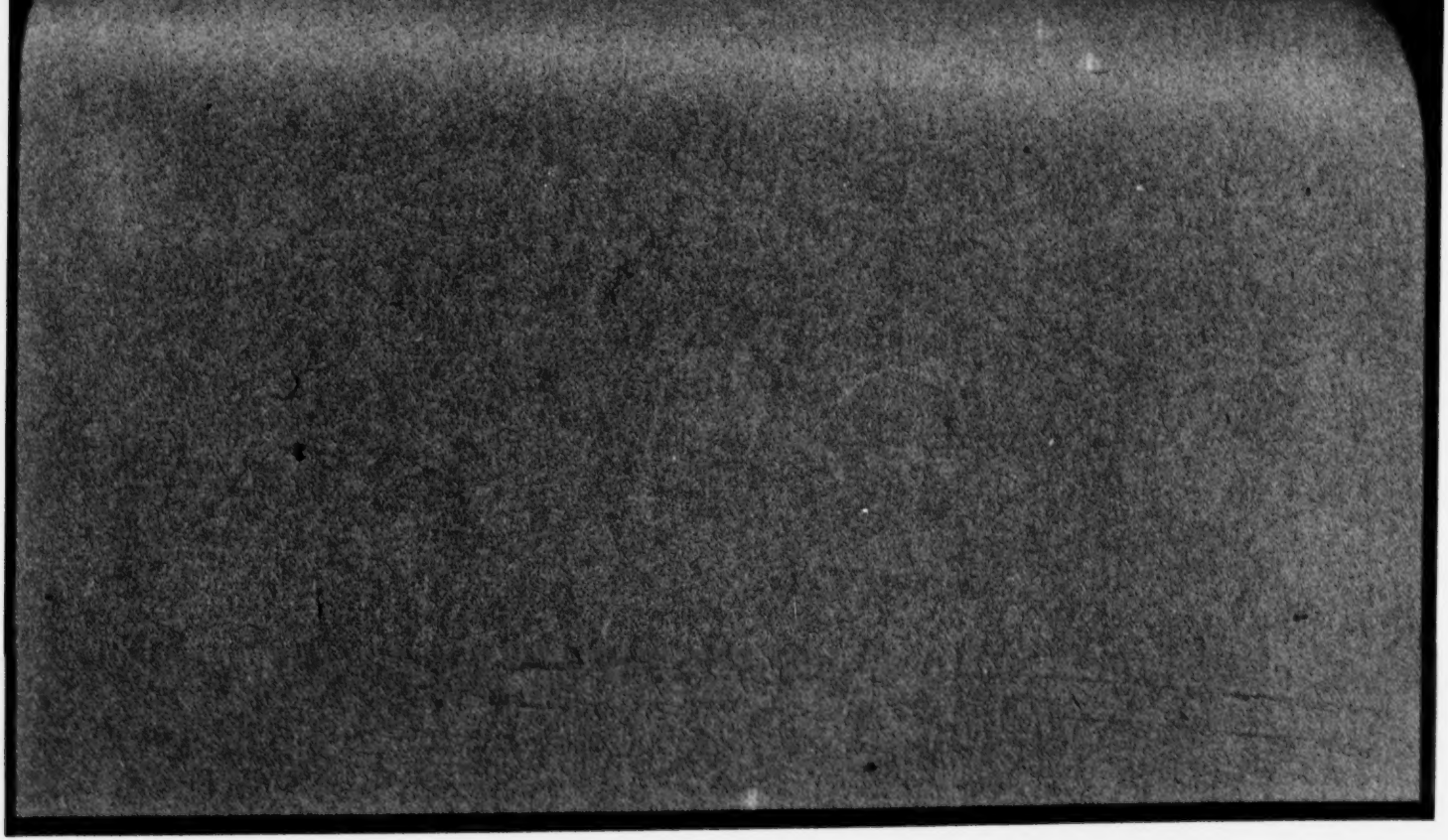
Appeal from the District Court of the United States for the District of Illinois.

BRIEF AND ARGUMENT OF APPELLANT.

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In the Supreme Court of the United States.

THE MUTUAL FILM CORPORATION OF MISSOURI, *Appellant*,

vs.

GEORGE H. HODGES, Governor; CHARLES H. SESSIONS, Secretary of State; JOHN S. DAWSON, Attorney-general; and W. D. ROSS, State Superintendent of Public Instruction, of the State of Kansas, *Appellees*.

No. 597.

BRIEF AND ARGUMENT OF APPELLEES.

This suit was brought against the appellees herein by the Mutual Film Corporation, incorporated under the laws of Delaware, and licensed to transact business in Missouri, appellant, for the purpose of having chapter 294 of the Session Laws of Kansas of 1913 declared unconstitutional.

The appellant is engaged in hiring, renting and shipping moving-picture films and reels into the state of Kansas to be used and exhibited by the various picture and show houses operating in said state. And appellant complains that the provisions of said chapter 294, requiring an inspection of the picture films and reels so hired, rented and shipped by it into the state of Kansas for exhibition purposes, is unconstitutional

and void, for the reasons set forth in its assignment of errors. Said assignment of errors is as follows (Rec. 71-72):

ASSIGNMENT OF ERRORS.

Now comes complainant and respectfully shows the court erred in entering its decree and orders of and as of June 25, 1914, in these respects:

1.

The court erred in decreeing and ordering that there is no equity in the said amended bill of complaint filed herein, and in dismissing the same therefor.

2.

The court erred in refusing to order and decree a permanent injunction as prayed for in said amended bill of complaint, restraining and enjoining the said defendants therein from enforcing the provisions of the said legislative act of the state of Kansas set out, pleaded and made a part of said amended bill of complaint, for the following reasons:

(*a*) Said legislative act in question is unconstitutional, being in conflict with and in violation of the constitution of the United States, as well as the constitution of the state of Kansas.

(*b*) Said legislative act in question is in violation of section 10, article 1 of the constitution of the United States, in that no state shall, without the consent of the Congress, lay any imposts or duties on imports, or exports, except what may be absolutely necessary for executing its inspection laws, for the reason that a tax (called "fee") is provided for and levied by said act in question upon imports of motion picture films into the state of Kansas, for the benefit of the general revenue fund of the state of Kansas, and not for the necessary inspection cost of said films.

(*c*) Said legislative act in question is in violation of section 8, article 1 of the constitution of the United States, in that it is a tax upon interstate commerce, and the commerce between citizens of different states, being

a revenue measure, for the benefit of the general revenue fund of the state of Kansas, under the guise of an inspection tax.

(*d*) Said legislative act in question is an attempt to prohibit by inspection and censorship the importation of a legitimate article of commerce into the state of Kansas, which article intrinsically is not a matter subject to inspection or censorship.

(*e*) Said legislative act in question is in violation of section 1 of the fourteenth amendment to the constitution of the United States, in that it abridges the privileges and immunities of citizens of other states in transacting legal and lawful business with the citizens of the state of Kansas, and deprives the complainant of its property without due process of law, for the reason that said legislative act provides it to be "the duty of every person, firm or corporation, intending to sell, rent or exhibit any moving picture film or reel" within the state of Kansas, to present the same to the superintendent of public instruction, to be inspected and censored by him for a tax (called "fee") of $2 for each film so presented, said "fee" to be paid into the general revenue fund of the state of Kansas; and thereby said legislative act imposes a tax, assessment, servitude and burden upon complainant's property, for the benefit of the general revenue fund of the state of Kansas, but makes no provision for a mode of confirming, or contesting the decision of the censor or the tax thus imposed, in the ordinary courts of justice.

3.

The court erred in decreeing and ordering that there is no equity in said amended bill of complaint filed herein, and in dismissing the same therefor; and further erred in refusing to order and decree a permanent injunction, as prayed for in said amended bill of complaint, restraining and enjoining said defendants therein from enforcing the provisions of the said legislative act of the state of Kansas, set out, pleaded

and made a part of said amended bill of complaint, for the following reasons:

Said legislative act in question is one of censorship and is in violation of the constitutional guarantees of the freedom of speech and of the press, so provided for by section 1 of the fourteenth amendment to the constitution of the United States, which provides: "That no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and section 11 of the bill of rights of the constitution of the state of Kansas, which provides that: "The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such rights."

The act of the legislature complained of by appellant is not long, and, for the convenience of the court we will here set it out in full:

CHAPTER 294.

Concerning Moving-picture Films or Reels — State Superintendent of Public Instruction to Examine.

(Senate bill No. 367.)

AN ACT regulating the exhibiting or using of moving-picture films or reels; providing and regulating the examination and approval of moving-picture films and reels, and fixing penalties for the violation of this act, and making an appropriation for clerical help to carry this act into effect.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That on and after April 1, 1913, it shall be unlawful for any person, firm or corporation to exhibit or use any moving-picture film or reel unless the said film or reel shall have been examined and approved by the state superintendent of public instruction, as hereinafter provided for; provided, that nothing in this act shall apply to moving-picture films or reels used exclusively in institutions of learning in Kansas.

SEC. 2. In addition to the duties now imposed upon the state superintendent of public instruction, it shall be his duty to examine all moving-picture films or reels intended for exhibition in this state, and approve such

as he shall find to be moral and instructive, and to withhold his approval from such as tend to debase or corrupt the morals. Upon such moving-picture films or reels examined by him, and which shall be approved by him, there shall be stamped or written a certificate signed by him showing that such picture has been examined and approved by him, giving the date of such approval.

SEC. 3. The said superintendent of public instruction shall keep an accurate record of all examinations made by him and the date thereof, and by whom presented for examination, and noting such pictures as shall be approved and such as shall not have been approved, and briefly stating his reasons for withholding his approval of such as are not approved.

SEC. 4. For each examination made by said officer he shall receive the sum of two dollars for each moving-picture film or reel. No picture, film or reel shall be examined until such fee shall have been paid to him, and all such fees shall be paid by him on the last day of each quarter to the state treasurer, and by said state treasurer credited to the general revenue fund; provided, that the treasurer shall issue receipts for such fees in triplicate, one to the state auditor, one to the state superintendent and one to be kept by him and filed in his office. Provided, that for good and sufficient reasons shown, the governor may authorize the employment by the superintendent of public instruction, one or more additional clerks in his office as may be necessary, at a per diem not to exceed three dollars per day for each day actually employed, which per diem shall be paid out of the general revenue fund on warrants duly issued and payable in the same manner as other clerks in said office are paid.

SEC. 5. That the said state superintendent of public instruction shall have general power and authority to supervise and regulate the display of all moving-picture films or reels in all places of amusement or elsewhere within this state. Said power and authority shall include the power to inquire into and investigate, and to have displayed for his benefit, to aid him in his investigation, the moving-picture films or reels which are intended to be displayed, and said state superintendent of public instruction shall approve such moving-picture films or reels as shall be moral and proper, and disapprove such moving-picture films or reels as are sacrilegious, obscene, indecent or immoral, or such as tend to

corrupt the morals; provided, however, in the case he should disapprove of any moving-picture film or reel, the person, firm or corporation offering the same for examination may have the same examined by a commission consisting of the governor, attorney-general and secretary of state, who shall examine said reel or film, and if they, or a majority of them shall find the same is fit for exhibition, on their order the said superintendent of public instruction shall endorse his approval thereon.

SEC. 6. It shall be the duty of every person, firm or corporation intending to sell, rent or exhibit any moving-picture film or reel within this state, to furnish to said superintendent of public instruction, as he may require a description of said moving-picture film or reel, describing the scenes and purposes of any film or reel, and to exhibit and display for his examination and approval or disapproval any such film or reel.

SEC. 7. Any person, firm or corporation exhibiting or permitting to be exhibited any unapproved moving-picture film or reel shall be guilty of a misdemeanor, and shall be fined not less than twenty-five dollars nor more than one hundred dollars for the first offense, and not less than one hundred dollars for each subsequent offense. Each unapproved moving-picture film or reel exhibited, and each day the same shall be exhibited, shall constitute a separate offense.

SEC. 8. All laws and parts of laws so far as they conflict herewith are hereby repealed.

SEC. 9. This act shall take effect and be in force on and after the first day of April, 1913, and its publication in the official state paper.

Approved March 13, 1913.

Published in official state paper March 22, 1913.

The questions involved in this suit appear, from the appellant's assignment of errors hereinbefore set out. to be as follows:

1. That chapter 294, Session Laws of Kansas of 1913, is in violation of the constitution of the United States and of the state of Kansas.

2. That the inspection fee provided for in said chapter 294 lays an impost or duty on picture films or reels imported into Kansas for exhibition purposes, and is therefore in violation of section 10, article 1, constitution of the United States, for the reason that it lays an

impost or duty on picture films and reels imported into Kansas for exhibition purposes.

3. That the fees provided for in said act is an unreasonable censor or inspection charge against such picture films or reels.

4. That picture films or reels are not proper subjects of censor or inspection by a state before they can be exhibited to the public in such state.

5. That the act in question is a revenue measure for the benefit of the general fund of the state, and is therefore a tax upon interstate commerce, in contravention of section 8, article 1 of the constitution of the United States.

6. That the act in question is in contravention of section 1 of the fourteenth amendment to the constitution of the United States in that it deprives appellant of its property without due process of law by imposing a fee of two dollars per film or reel inspected under the provisions of said act.

7. That the act in question is in violation of section 1 of the fourteenth amendment to the constitution of the United States in that it abridges the privileges or immunities of citizens of the United States in the matter of free speech and free press, and section 11 of the bill of rights of the constitution of Kansas.

There are also two other questions urged by the appellant in its brief in the court below, and, as we have not had an opportunity to examine its brief in this honorable court, we desire to direct attention to them at this time, following the assignment of errors with appropriate numbers. They are as follows:

8. That the expense for approval of films would be $39,000.00 for the first three months, and $25,000.00 for the remainder of the year. That the total expense to the state would not exceed $6,000.00 for the first year, and not to exceed $3,000.00 thereafter.

9. That the films or reels contained nothing immoral, sacrilegious or impure.

We will endeavor to discuss these propositions in the order above set forth:

I.

Is the act in question in violation of the constitution of the United States and of the state of Kansas?

The complainant insists that the act in question is in violation of the constitution of the state of Kansas, and therefore the district court should have so held, and granted a permanent injunction against the defendants named in complainant's amended bill of complaint.

In the succeeding assignments of errors appellant sets forth its different contentions as to the unconstitutionality of the act in question. The authority of the legislature to enact the act, of course, is dependent upon the police power. The expression by the supreme court of Kansas in which it is attempted to define the limits of the police power that may be exercised by the legislature of this state is found in the case of Meffort v. Medical Board, 66 Kan. 710. In that case legislation under the police power of the state is discussed by the court as follows:

"This is a proceeding in error to reverse the judgment of the district court of Shawnee county refusing to grant a temporary injunction prohibiting the state board of medical registration and examination from placing of record, and enforcing an order theretofore made revoking the license of William M. Meffert to practice medicine and surgery in Kansas.

"The statute under which the proceedings were had is chapter 254, Laws of 1901 (Gen. Stat. 1901, §§ 6669-6677), and is entitled 'An Act to create a state board of medical registration and examination, and to regulate the practice of medicine, surgery and osteopathy in the state of Kansas, prescribing penalties for the violation thereof, and repealing chapter 68 of the Session Laws of 1870.' The board consists of seven members. The only provision of this law specially involved in this litigation is that part of section 2 which reads:

"'All persons engaged in the practice of medicine on the date of the passage of this act shall, within four months from the date of such passage, apply to the board of registration and examination for a license

to practice. . . . The board may refuse to grant a certificate to any person guilty of felony or gross immorality or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery, and may, after notice and hearing, revoke the certificate for like cause.' "

. . . . . .

"One of the rights reserved to the state is to determine the qualification for office and the conditions upon which citizens may exercise the various callings and pursuits within its limits. This power was recognized in England more than 300 years ago, and has been the law of that country ever since. (Dr. Bonham's Case, 4 Coke, 367.)

"In Dent v. West Virginia, 129 U. S. 114, 122, 9 Sup. Ct. 231, 233, 32 L. Ed. 623, the court said:

" 'The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely.' "

. . . . . .

"The argument is that to deprive a physician of his right to practice medicine otherwise than by a judgment of forfeiture by a judicial tribunal is without due process of law, and is in violation of the fourteenth amendment to the constitution of the United States, which declares: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law.' This constitutional provision is not a restriction or limitation on the police power of the state to pass and enforce such laws as in its judgment will inure to the health, morals or general welfare of its people. Such power is reserved to the state, which has been so recognized by all courts since the adoption of this amendment.

In People v. King, 110 N. Y. 418, 423, 18 N. E. 245, 246, 1 L. R. A. 293, 6 Am. St. Rep. 389, it was said:

" 'But, as the language of the constitutional prohibition implies, life, liberty and property may be justly affected by law, and the statutes abound in examples of legislation limiting or regulating the use of private

property, restraining freedom of personal action or controlling individual conduct, which, by common consent, do not transcend the limitations of the constitution. This legislation is under what, for lack of a better name, is called the police power of the state, a power incapable of exact definition, but the existence of which is essential to every well ordered government. By means of this power the legislature exercises a supervision over matters involving the common weal and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community, and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion with which the courts cannot interfere.'

"In Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359, 28 L. Ed. 293, the court, in speaking upon this subject, used the following language:

" 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state; develop its resources and add to its wealth and prosperity.'

"In Mugler v. Kansas, 123 U. S. 623, 665, 666, 8 Sup. Ct. 273, 299, 31 L. Ed. 205, the court said:

" 'The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.

" 'The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the prin-

ciple, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

" 'By the settled doctrines of the court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purpose, does not, in the sense of the constitution, necessarily entrench upon any authority which has been confided expressly or by implication, to the national government.'

"To the same effect are Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346, and In re Rahrer, 140 id. 545, 11 Sup. Ct. 865, 35 L. Ed. 572.

"In The City of Cincinnati v. Steinkamp, Trustee, 54 Ohio St. 284, 201, 43 N. E. 490, the court, in speaking of the act to regulate the construction of buildings within cities of the first class and first grade, and to provide for the appointment of an inspector of buildings, said: 'This section does not abridge the exercise of the police power of the states, nor limit the subjects upon which they may legislate.' In Leisy v. Hardin, 135 U. S. 100, 127, 10 Sup. Ct. 690, 34 L. Ed. 128, Mr. Justice Gray, in speaking of the exercise of the police power of the state, said:

" 'Among the powers thus reserved to the several states is what is commonly called the police power—that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the state against disorder, disease, poverty and crime.'

"This contention was very aptly and forcibly answered by the supreme court of Minnesota in State v. Board of Medical Examiners, 34 Minn. 387, 389, 390, 26 N. W. 123, 124, where it was said:

" 'The radical fallacy of this chain of argument is the assumption that the revocation of such a license is the exercise of judicial power. "Due process of law," or "the law of the land" (which is the same thing) is not necessarily judicial proceedings. Private rights and the enjoyment of property may be interfered with by the legislative or executive, as well as the judicial department of government. When it is declared that a person shall not be deprived of his property without "due process of law," it means such an

exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belong. . . . It has never been held that the granting, or refusing to grant, such a license as this was the exercise of judicial power, and in fact, this is not claimed in this case; and there is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise is, in each case, identical, viz., to exclude an incompetent or unworthy person from this employment. Therefore, the same body which may be vested with the power to grant, or refuse to grant, a license, may also be vested with the power to revoke. The statutes of all the states are full of enactments giving the power to revoke licenses of dealers, innkeepers, hackmen, draymen, pawn-brokers, auctioneers, pilots, engineers, and the like, to the same bodies, boards, or officers who are authorized to issue them, such as city councils, county commissioners, selectmen, boards of health, boards of excise, etc. The constitutionality of such laws, as a valid exercise of the police power, has often been sustained and, indeed, rarely questioned'."

. . . . . .

"We are of the opinion that the petition states no ground for equitable relief, and there was no error committed by the court below in sustaining the demurrer to the petition." (66 Kan. 711, 712, 714, 718, 719, 720, 721, 722, and 726.)

This case was affirmed by the United States supreme court. (Meffert v. Packer, etc., 195 U. S. 625.)

The expression by the supreme court of Ohio, in which it is attempted to define the limits of the police power that may be exercised by the legislature of that state, is found in the case of Board of Health v. Greenville, 86 O. S. 1. It is a very similar case to Meffert v. Medical Board, *supra*. In that case certain legislation concerned is summarized by the court in its opinion, as follows:

"This act, in substance, provides that whenever complaint in writing is made to the State Board of Health that a city, village, corporation or person is discharg-

ing, or permitting to be discharged, sewage, or other waste into a stream, water-course, lake or pond, and thereby creating a public nuisance detrimental to health or comfort, that *it shall be the duty of such board of health to forthwith inquire into and investigate the conditions complained of; if upon such investigation the complaint is found to be true,* that it thereupon notify such city, village, corporation or person causing the contamination or pollution of the stream, water-course, lake or pond, and give it or him an opportunity to be heard; if after such hearing, the State Board of Health shall determine that improvements or changes are necessary and should be made, it is its duty to report its finding to the governor and attorney general and upon their approval notify the city, village, corporation or person to install works or means satisfactory to the State Board of Health for purifying, or otherwise disposing of its sewage, or to change or enlarge existing works in a manner satisfactory to said board, and to fix a time at which the same must be completed, which time shall also be subject to the approval of the governor and attorney general. It is further provided in section 4 of the act, that when such order so approved is not acceptable to any city, village, corporation or owner affected thereby, it or he shall have the right to appeal the question of the necessity and reasonableness of such order to two reputable and experienced sanitary engineers, one to be chosen by the city, village, corporation or owner, the other to be chosen by the State Board of Health, but the person so chosen shall not be a regular employee of said board, and if these engineers are not able to agree, then they shall choose a third engineer of like standing. The engineers constituting such board of reference shall have power to affirm, modify or reject the order of the State Board of Health submitted to them, and their decision shall be final."

On page 20 the court uses the following language as to its authority to declare an act unconstitutional and follows it with a definition of the police power of the legislature:

"Before discussing these several objections in detail, it is well to give some attention to the general principles applicable to all of them. A court is not authorized to adjudge a statute unconstitutional where the question of its constitutionality is at all doubtful. The question of the constitutionality of every law being first

determined by the legislature, every presumption is in favor of its constitutionality. It must, therefore, clearly appear that the law is in direct conflict with inhibitions of the constitution before a court will declare it unconstitutional. Nor has the question of the wisdom of the legislation anything to do with determining its constitutionality. That question is for the legislature, and whether the court agrees with it in that particular or not is of no consequence. It is solely a question of power. *If the legislature has the constitutional power to enact a law, no matter whether the law be wise or otherwise it is no concern of the court.* If the legislature had not the constitutional power to enact the law, it is not important how wise, necessary or beneficent the legislation may be, it is necessarily void as being in conflict with the organic law of the state.

"*The court will not measure its opinion with the opinion of the legislative branch of the government upon questions of the expediency, justice or necessity of a law.*

In the case of Lindsay et al. v. Commissioners, 2 Bay (S. Car.) 61, the court used this language: 'In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."

"This particular legislation now under consideration is designed to preserve and protect the public health and comfort, and, therefore, falls directly within the police power of the state. This power includes anything which is reasonable and necessary to secure the peace, safety, health, morals and best interests of the public. It is now the settled law that the legislature of the state possesses *plenary power to deal with these subjects so long as it does not contravene the constitution of the United States or infringe upon any rights granted or secured thereby,* or is not in direct conflict with any of the provisions of the constitution of this state, and is not *exercised in such an arbitrary and oppressive manner as to justify the interference of the courts* to prevent wrong and oppression.

The right of a court to interfere with the legis-

lature of a state in the exercise of police power is very clearly expressed by Mr. Justice Harlan in the case of Jacobson v. Massachusetts, 197 U. S. 11: 'If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the *public health, the public morals or the public safety,* has no real or substantial relation to those objects, *or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law,* it is the duty of the courts to so adjuge, and thereby give effect to the constitution.' This doctrine has also been declared in the case of Mugler v. Kansas, 123 U. S. 623; Minnesota v. Barber, 136 U. S. 313, 320; Atkin v. Kansas, 191 U. S. 207, 223. *The possession and enjoyment of all rights guaranteed to the citizen under the constitution of the United States and the state of Ohio are subject to such reasonable conditions as may be deemed by the governing authority of the state essential to the safety, health, peace, good order and moral of the community.* It is said by Mr. Justice Field in the case of Crowley v. Christensen, 137 U. S. 86, that: *'Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's will.'"*

In the case of Bank v. Haskell, 219 U. S. 104, the supreme court of the United States uses the following language:

"It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and propenderous opinion to be greatly and immediately necessary to public welfare."

In the case of Purity Extract Co. v. Lynch, 226 U. S. 193, it is said:

"The court has no concern with the wisdom of exercising the police power, and unless the enactment has no substantial relation to a proper purpose, it can not declare that the limit of legislative power has been transcended."

In the case of Home Telephone Co. v. Los Angeles, 311 U. S. 265, it is said on page 280:

"But in determining whether the legislature in a particular enactment has passed the limits of its constitutional authority . . . it is a well-settled rule of constitutional exposition that if a statute may or may not be according to circumstances, within the limits of legislative authority, *the existence of the circumstances necessary to support it must be presumed.*"

This doctrine of the federal courts corresponds to the rule of the Ohio supreme court stated differently. We quote from State v. Nelson, 52 O. S. 89, where it is said:

"While a statute must stand or fall by its operation, rather than by its mere form, yet in passing upon the constitutionality of a statute, *the court can judge of its operations only through facts of which it can take judicial notice.*"

The following are further authorities:

United States v. D. & H. R. R. Co., 213 U. S. 366, 407, 416.

Schmidinger v. Chicago, 226 U. S. 578, 589.

It is, of course, further recognized that where private property is dangerous to the safety or health of the community, it may be summarily destroyed without violating the due process of law provisions of either the federal or state constitution.

Adams v. Milwaukee, 228 U. S. 572.

Sentell v. New Orleans, &c., R. Co., ———.

Lawton v. Steele, 152 U. S. 135.

II.

That the inspection fee provided for in chaper 294 of the Session Laws of Kansas of 1913 is in violation of section 10, article 1, of the constitution of the United States for the reason that it lays an impost or duty on picture films and reels imported into Kansas for exhibition purposes?

The question presented by this assignment has been repeatedly determined by this court against the conten-

tion of appellant. In Woodruff v. Parham, 8 Wall. 123, the headnote is as follows:

"The term 'import' as used in that clause of the constitution which says that 'no state shall levy any imposts or duties on *imports* or exports' does not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States. Hence, a uniform tax imposed by a state on *all* sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of that state enacting the law or of some other state, is valid."

Mr. Justice Miller, deliverng the opinion of the court, says:

"It is not too much to say that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. The only allusion to imposts in the articles of confederation is clearly limited to duties on goods imported from foreign states. Wherever we find the grievance to be remedied by this provision of the constitution alluded to, the duty levied by the states on foreign importations is alone mentioned, and the advantages to accrue to Congress from the power confided to it, and withheld from the states, is always mentioned with exclusive reference to foreign trade.

"Whether we look, then, to the terms of the clause of the constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one state to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the constitution as thus construed."

Brown v. Huston, 114 U. S. 622-628.

Pittsburg Coal, etc., Co. v. Louisiana, 156 U. S. 590.

Patapsco Guano Co. v. North Carolina, 171 U. S. 345-350.

Austin v. Tennessee, 179 U. S. 343-345.
Dooley v. United States, 183 U. S. 151-153.
American Steel, etc., v. Speed, 192 U. S. 500.
McLean v. D. & R. G. R. Co., 203 U. S. 38.

The appellant is a Delaware corporation, and as such is a citizen of said state in its business relations between other citizens of the same or other states of the Union. It is not an importer in the light of the above authorities, therefore said chapter 294 does not lay an impost or duty upon picture films or reels disposed of or rented by said corporation in Kansas, in contravention of section 10, article 1, constitution of the United States.

III.

That the fee provided for in said act is an unreasonable censor or inspection charge against such picture films or reels.

There is no way to arrive at the actual cost of the inspection provided for in the statute in question. It would be difficult to ascertain and prove. There is nothing in appellant's bill or proof that throws any definite light upon the subject. The legislature expressed its judgment and placed the amount at two dollars per film or reel, and this we think it had a right to do, and that the amount so placed is conclusive upon this court.

In the headnote of Standard Stock Food Co. v. Wright, 225 U. S. 540, it is said:

"Where the fair import of the provisions of a state police statute is that the fees exacted are for necessary expenses of inspecting an article properly the subject of inspection, and the bill alleged no facts warranting a conclusion that the charges are unreasonable as compared with the cost, this court will not condemn the statute as an unconstitutional revenue measure."

It does not concern the appellant that the act may be crudely drawn nor that the moneys received for inspection are first turned into the general revenue fund of the state, to be later disposed of as the legisla-

ture shall deem proper, since it is clearly shown that the state, at large expense from the general revenue fund of the state, does pay the salaries of the persons charged with the administration of this law, these defendants herein, and since the legislature likewise appropriates large contingent funds for the use of these defendants in the enforcement of this and other laws; and since, also, out of the general revenue enormous disbursements are made for education, when it is obvious that uncensored moving pictures are inimical to education and good morals, appellant will never be able to show that the moneys derived from inspection are more than the state expends to minimize the evil of uncensored pictures, or even approach the amount that the state expends.

The case of Patapsco Guana Co. v. North Carolina, *supra*, was a case involving a statute of the state of North Carolina providing for the inspection of certain imported articles. And the court, in discussing par. 10 of art. 1 of the constitution, held as follows (p. 356):

"The words 'imports' and 'exports' as therein used have been held to apply only to articles imported from or exported to foreign countries."

It is further held (p. 352):

"Entertaining these views of the legislative intention, it does not appear to us that evidence tending to show that money collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of the act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge. But treating the question whether the charge of 25 cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question, we are satisfied that comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on, we can not conclude that the charge

is so seriously in excess of what is necessary for the objects designed to be effected, as to justify the imputation of bad faith and change the character of the act."

On page 355, the court quotes with evident approval the language of Justice Bradley in Neilson v. Barcia, 2 Woods, 287:

"How the question, whether a duty is excessive or not, is to be decided may be doubtful. As that question is passed upon by the state legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. . . . It seems to me that congress is the proper tribunal to decide the question."

The case of Savage v. Jones, 225 U. S. 501, also concerned the state inspection of stock foods, and the same position was taken by the court as in the last two cases mentioned. On page 525 the court says:

"But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce."

On page 528, the court says:

"The provisions for the filing of a certificate for registration, and for labels, were merely incidental. It is said that the statute permits the state, through its officials, to set up arbitrary standards governing conditions of manufacture. But it does not appear that there has been any attempt to enforce one against the complainant . . . the complainant has declined to file the statement . . . instead he resorts to this suit."

In the case of McLean v. D. & G. R. R. Co., 203 U. S. 38, 55, the court says:

"The law being otherwise valid, the amount of the inspection fee is not a judicial question. It rests with the legislature to fix the amount, and it can only present a valid object when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law."

e case of C. B. & Q. Rld. Co. v. Cram, 33 Supt. Ct. R437, involved a statute of the state of Nebraska reve to the shipment of stock and the damages for de on the ground that it offends the fourteenth ardment of the constitution. Mr. Justice McKenna saor the court (p. 440):

e need not extend the discussion. We repeat, the cas here in a simple aspect. Two propositions only arvolved: (1) the power of the legislature to impo limitation of the time for the transportation of livtock; (2) to provide for a definite measure of dages which may be difficult to estimate or prove. It oo late in the day to deny the possession of the firower, and we think the other is as fully establis, and that the statute was enacted to meet condits which had arisen from the conduct of carriers, anhich, in the judgment of the legislature, demad a remedy."

case of Commonwealth v. Herr et al., 78 Atl. Re8, was a case involving the constitutionality of a sta of Pennsylvania relating to the grade of school tears. The third, sixth and seventh paragraphs of thlabus are as follows:

In construing a statute, such a construction sh be adopted, if fairly possible, as will avoid a cosion that would make it unconstitutional; the prption being that the legislature does not intend to ate the constitution.

. . . . . .

The state legislature may exercise all powers of a llative character not prohibited to it by the state or ral constitution.

Nothing but a clear violation of the constitution wistify the judicial department in pronouncing a sta unconstitutional, and the real or supposed motivf the legislature in passing an act are not open to cial inquiry."

, P. J., in delivering the opinion of the court, sab. 70):

e party who wishes to pronounce a law unconstitutl takes upon himself the burden of proving beyoll doubt that it is so. . . . Nor are the motivf the legislature, real or supposed, in passing an acen to judicial inquiry or consideration."

The legislature of the state of Kansas had the right to fix a reasonable amount for the inspection of each film or reel to be used for exhibition purposes within the state. It fixed that amount at $2 per reel or film, and it is beyond the province of the court, under the authorities above cited, to disturb the judgment of the legislature as expressed by that statute.

IV.

That picture films or reels are not proper subjects of censor or inspection by a state before they can be exhibited to the public in such state.

The appellant states, in substance, that the films or reels in question are photographs by which reproductions of plays, etc., are put upon screens or canvas. Therefore, if plays, etc., are subject to censor or inspection, films or reels upon which photographs of such plays, etc., are taken for reproduction on screens or canvas may be subjected to censor or an inspection also before they are exhibited to the public.

The case of Commonwealth v. McGann et al., 100 N. E. Rep. 337 (Adv. sheet No. 4, January 28, '13) was an attack on a statute of the state of Massachusetts relating to the licensing of certain theaters in that state. The fourth paragraph of the syllabus is as follows:

"Rev. Laws, c. 102, par. 172, providing for the licensing of theatrical exhibitions and revocation of such licenses at the pleasure of the municipal officers issuing them, construed to prohibit exhibitions injurious to public morals, is not violative of the liberty of the press, guaranteed by declaration of rights. par. 16."

Loring, J., delivering the opinion of the court, said:

"There is no question of the constitutionality of the R. L. c. 102, par. 172, so construed. Some theatrical performances are beneficial and some are injurious to public morals. It is within the limits of the police power to forbid the latter and to secure the former by requiring all theatres to be licensed by public officials

who are authorized to revoke and suspend the license at their pleasure; as is provided in R. L. c. 102, par. 172, at their pleasure in that act means from time to time in the exercise of a wise discretion, having in view the purpose sought by the act, namely, to prevent theatrical performances which are *contra bonos mores.*"

The case of Jake Block et al. v. The City of Chicago, 239 Ill. 251, was an action to enjoin the officials of the city of Chicago from proceeding under an ordinance on the ground that such ordinance deprived the complainants of their rights under the constitution. The fourth, sixth, ninth and eleventh paragraphs of the syllabus are as follow:

"4. *Constitutional law—city has power to regulate the moving picture business.* Clause 45 of section 1 of article 5 of the city and village act expressly authorizes the passage of an ordinance to prohibit the exhibition of immoral or obscene pictures, and the fact that the ordinance applies only to moving pictures and does not prohibit the exhibition of stationary ones does not amount to a sanction of the exhibition of stationary pictures which are immoral or obscene, nor furnish ground for a claim of discrimination against the moving picture business."

"6. *Same—what does not render moving pictures ordinance invalid.* The fact that an ordinance which requires exhibitors of moving pictures to first exhibit them to the chief of police does not require that scenes enacted on the stage of theatres be first enacted before the chief of police does not render the ordinance invalid, even though some of the moving pictures are reproductions of the scenes enacted in the theatres.

"9. *Same—ordinance prohibiting exhibition of 'immoral or obscene' pictures fixed a sufficient standard.* An ordinance prohibiting the exhibition of 'immoral or obscene' pictures is not invalid because it fixes no other standard for the determination by the chief of police of the character of the pictures, where there is nothing in the ordinance to prevent resort to the courts to compel the chief of police to issue a permit to exhibit a picture which is not, in fact, obscene or immoral.

. . . . . .

"11. *Same—what is not depriving a person of property without due process of law.* A city has power to

pass an ordinance prohibiting the exhibition of moving pictures which are immoral and obscene, and if the ordinance applies to all persons engaged in the moving picture business, the fact that such persons will be required to pay rent for the films during the time necessary for their inspection by the chief of police does not amount to depriving them of property without due process of law."

Mr. Chief Justice Cartwright delivered the opinion of the court, and as it seems to be applicable to the case at bar we will take the liberty to reproduce the entire opinion:

"The plaintiffs in error, Jake Block, Nathan Wolf, J. H. Ferris, B. Mumstock, S. VanRondel, and A. Van Ronkel, filed their bill of complaint in the superior court of Cook county against the defendant in error, City of Chicago, alleging that they were engaged in the business of operating five- and ten-cent theaters in the city of Chicago, where moving pictures were displayed, and praying the court to enjoin the defendant in error from enforcing an ordinance entitled 'An ordinance prohibiting the exhibition of obscene and immoral pictures and regulating the exhibition of pictures of the classes and kinds commonly shown in mutoscopes, kinetoscopes, cinematographs and penny arcades, passed November 4, 1907, and in force November 19, 1907, and to restrain the further prosecution of a suit brought by defendant in error against said Jake Block in the municipal court of Chicago for a violation of said ordinance, and the bringing of any proceedings against any of the complainants for any alleged violation of the provisions of the said ordinance. The court sustained the demurrer of the defendant to the bill, and the complainants having elected to stand by their bill, it was dismissed for want of equity, at their costs.

"The ground upon which the injunction was asked for was, that the ordinance deprived the complainants of their rights under the constitution and was therefore void, and for that reason the record has been brought directly to this court for review by writ of error.

"The ordinance requires those engaged in the business of exhibiting moving pictures to secure a permit for the exhibition of such pictures, and provides that the chief of police shall not issue a permit for the exhibition of any obscene or immoral picture or series of pictures, but that he shall issue a permit, without fee

or charge, for all pictures which are not obscene or immoral. The ordinance declares that it shall be unlawful for any person, firm or corporation to show or exhibit in a public place, or in a place where the public is admitted, any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or moving picture devices, without first having secured a permit therefor from the chief of police. It requires the applicant for a permit to show to the chief of police the plates, films, rolls or other like apparatus by or from which the picture or series of pictures is shown or produced or the picture or series of pictures as shown or exhibited. The chief of police must either grant or deny the permit within three days after such inspection, and if the picture or series of pictures is immoral or obscene he must refuse the permit, but otherwise it is his duty to grant it without a fee or tax of any kind. If the chief of police refuses to grant a permit the applicant may appeal to the mayor, whose decision shall be final. When a permit is once granted the picture or series of pictures may be shown by any other exhibitor, provided the written permit is delivered to him and a written notice of the transfer or lease is mailed to the chief of police, and any number of transfers or leases of the same picture or series of pictures may be made under those conditions. The permit must be posted at or near the entrance to the place of exhibition, and any one violating the terms of the ordinance is subject to a fine of not less than $50 nor more than $100, for each offense.

"The material facts alleged in the bill and taken to be true for the purposes of the demurrer are as follows: The complainants are engaged in the business of operating five- and ten-cent theaters, where moving pictures are displayed by means of moving picture machines known as mutoscopes, kinetoscopes, and cinematographs, and have paid a license fee for the business. The pictures are displayed upon canvas and are taken from plays and dramas which the bill says are moral and in no way obscene. Among the pictures are pictures taken from the plays known as the 'James Boys' and the 'Night Riders,' displaying experiences connected with the history of this country. There had been, and at the time of the display of the pictures by

complainants there were, certain plays and dramas being performed in certain playhouses in the city of Chicago of which the pictures were reproductions of parts. The films which are used in exhibiting pictures are not owned by the exhibitors but are rented from concerns which make a business of renting films to complainants and others at a certain rental per week, and if the films must first be exhibited to the chief of police and a permit obtained it will be necessary to rent the films for a greater length of time and for a larger expense than otherwise. The chief of police refused to grant a permit for the display of the pictures of the 'James Boys' and 'Night Riders,' and others used by the complainants, about two hundred or three hundred in all, without having any hearing in a court of law where the complainants might defend their rights and property interests. The defendant brought an action in the municipal court against the complainant Jake Block for a penalty for exhibiting the pictures known as 'James Boys' without a permit, and threatened to bring other proceedings against Jake Block and other complainants. There are about two hundred persons engaged in the same business in Chicago in addition to the complainants, all of whom are similarly situated, and the chief of police threatens to enforce the ordinance against all of them. At the same time permits to complainants were refused for the pictures named, some of the pictures prohibited were being shown in the city in stereopticon views and stationary pictures. The bill alleges that the ordinance is void because it discriminates against the exhibitors of moving pictures, delegates discretionary and judicial powers to the chief of police, takes the property of complainants without due process of law, and is unreasonable and oppressive.

"The purpose of the ordinance is to secure decency and morality in the moving picture business, and that purpose falls within the police power. It is designed as a precautionary measure to prevent exhibitions criminal in their nature and forbidden by the laws. Even the possession of an indecent picture is a crime under section 223 of the criminal code, and the offender may be confined in the county jail not more than six months or be fined not less than $100 nor more than $1000 for each offense. The ordinance applies to five- and ten-cent theaters such as the complainants operate, and which, on account of the low price of admission,

are frequented and patronized by a large number of children, as well as by those of limited means who do not attend the productions of plays and dramas given in the regular theaters. The audiences include those classes whose age, education and situation in life specially entitle them to protection against the evil influence of obscene and immoral representations. The welfare of society demands that every effort of municipal authorities to afford such protection shall be sustained, unless it is clear that some constitutional right is interfered with. The defendant by its charter has been invested with very extensive powers to enable it to accomplish the purpose of this ordinance. By clause 41 of article 5 it is authorized to license, tax, regulate, suppress and prohibit exhibitions, shows and amusements. Clause 45 gives power to prohibit the sale or exhibition of obscene or immoral publications, prints, pictures or illustrations, and clause 58 authorizes the defendant to regulate places of amusement. The legislature have thereby given to the defendant power to use every legitimate means for prohibiting and preventing the exhibition of obscene or immoral pictures, but it is argued that in doing so they have interfered with constitutional rights by requiring a permit for moving pictures while none is required for stereopticon or other stationary pictures. No fee, tax or other burden is laid upon the exhibitor of moving pictures, and the permit must be issued if the picture or series of pictures is not immoral or obscene.

"Counsel argue the question as though exhibitors of stereopticon or other stationary pictures are authorized by the ordinance to exhibit immoral or obscene pictures while the complainants are prohibited from doing so. That is a false notion, and is of the same character as the argument advanced in City of Chicago v. Brownell, 146 Ill. 64. It was there claimed that the ordinance prohibiting book making and pool selling, except within the enclosure of fair and race track associations during the actual time of the meetings of said associations or within twenty-four hours before any such meetings, was void as authorizing book making or pool selling in the excepted places at the times mentioned. The court said that the ordinance did nothing of the kind, but simply made no provision for the punishment of those who might do the specified acts within the enclosure at certain times. Attention was called to the radical and fundamental distinction

between a failure to provide punishment for an act and the sanction of it, and it is clear that the ordinance in this case does not authorize or sanction the exhibition of obscene or immoral pictures in stereopticon or other stationary pictures, which the statute of the state has made criminal. If this ordinance did not exist, neither the complainants nor other exhibitors of pictures would have any right to exhibit obscene pictures, either moving or stationary. If the pictures for which the chief of police refused permits were immoral or obscene, it is no ground of objection to the ordinance that other persons were violating the law by other means or that the ordinance does not provide for the punishment of such other persons.

"Another supposed discrimination is based on the allegation that some of the same scenes displayed by moving pictures are shown in theaters where the scenes are enacted upon the stage and there is no requirement that the show shall be given before the chief of police and a permit obtained. Clause 45 of article 5 of the city charter, which empowers the defendant to prohibit the exhibition of obscene or immoral pictures, has no reference to theaters. Their business is not the exhibition of pictures. It can not, therefore, be said that the exercise of the power conferred by clause 45 is unreasonable because it does not include the theater. Where an ordinance is passed in pursuance of an express power to pass an ordinance of that character, it can not be set aside by the courts because they may deem it unreasonable. (City of Peoria v. Calhoun, 29 Ill. 317; Dillon on Mun. Corp., sec. 262.) Unless the legislature had no power to confer upon the city the authority contained in clause 45 without including theaters, for the reason that the power delegated would be in conflict with the constitution, the objection now under consideration could not be sustained. The constitution contains a prohibition against local and special laws in certain classes enumerated in section 22 of article 4, but there is no other prohibition which can be enforced by the courts. In all other classes of cases the question whether a general law can be made applicable or whether a special one shall be passed is for the legislature. (Knopf v. People, 185 Ill. 20.) Under the constitution the legislature can not pass any special law incorporating a city or amending its charter, but clause 45 is general and applies to every city incorporated under the act, and the prohibition of the con-

stitution does not apply to ordinances that may be adopted by a city within the powers conferred upon it. (People v. Cooper, 83 Ill. 585.) It is true that an ordinance which deprives a party of a right guaranteed by the constitution is null and void, but the complainants were bound to point out such a provision to authorize the court to restrain the city from the enforcement of the ordinance. To say that an ordinance is special and applies only to a certain business or to persons engaged in a certain line of business does not condemn it.

"The ordinance, however, is not special and contains no discrimination against persons of the same class or engaged in the same business. It applies alike to all persons engaged in the moving-picture business, which the bill itself shows to be a separate and well-established branch of the amusement business. There is good ground for regulations concerning that business, which is different from the business of exhibiting pictures by stereopticons or other similar methods. As to the stereopticons and other similar pictures, there is no allegation in the bill that any business of that kind is carried on, and so far as appears it may be a mere incident of lectures, church entertainments or amateur performances; but if it is a business, the places where it is conducted may be inspected to ascertain whether there is any violation of law, while in the case of moving pictures, rented and passed from one exhibitor to another about the city and constantly changing, it would require the constant attendance of a great force of policemen at the various exhibitions in the two hundred places mentioned in the bill. There is also a radical difference between the burden imposed by the exhibition of films and pictures to be exhibited in the moving-picture show and a requirement that a large number of actors shall go through a dramatic performance before the chief of police. The one is but a trifling inconvenience, while the other would verge upon the ridiculous and entail great and unnecessary expense. To hold that a city, in executing the power conferred upon it to suppress and prohibit things which are hurtful to the morals of the people, must pursue the course insisted upon by counsel would be to practically prevent the execution of the power at all. The ordinance embraces all persons similarly situated and contains no discrimination as between them. (City of Chicago v. Bowman Dairy Co., 234 Ill. 294; Hawthorn v. People, 109 id. 302.) In Gundling v. City

of Chicago, 176 Ill. 340, the fact that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form was considered sufficient to authorize the city to single out, regulate and license the sale of tobacco in that form without including any other form of tobacco. There is at least equal reason for singling out and regulating the five- and ten-cent theaters, attended in great numbers by children, without including other theaters and other forms of public entertainment.

"It is also argued that the ordinance is void because it delegates legislative and judicial powers to the chief of police by giving him the power to determine whether a picture or series of pictures is immoral or obscene, and not giving to the applicant for a permit a day in court for the determination of the question whether the picture or series of pictures is immoral or obscene. It is true that a legislative body can not divest itself of its proper function to determine what the law shall be, but it may authorize others to do those things which it might properly but can not understandingly or advantageously do. That rule was stated as long ago as the case of Peoples v. Reynolds, 5 Gilm. 1, where it was said that without that power legislation would become oppressive and yet imbecile, and that local laws, almost universally, call into action to a greater or less extent the agency and discretion either of the people or individuals to accomplish in detail what is authorized or required in general terms. Government could not be carried on if nothing could be left to the judgment and discretion of administrative officers, and the doctrine of that case has been steadily adhered to ever since. Discretion may be reserved to the officer charged with the duty of issuing dram-shop licenses to determine the number to be granted and the location (People v. Cregier, 138 Ill. 401); and a reasonable discretion may be exercised by such officer, whether it is reserved to him by the ordinance or not. (Harrison v. People, 222 Ill. 150.) An act giving discretion to an inspector as to the number, location, material and construction of fire escapes is not unconstitutional, as delegating legislative or judicial power. (Arms v. Ayer, 192 Ill. 601.) Neither is an ordinance in violation of the constitution which gives to the commisioner of public works authority to approve a device to prevent the spilling of oil on the streets. (Spiegler v. City of Chicago, 216 Ill. 114.) It has never been questioned that power may be delegated to

officers to determine facts, such as whether animals are diseased so as to exclude them from importation; whether meat or food is found upon an inspection to be unhealthy or diseased; whether an assemblage amounts to a riot to be dispersed. There are numerous facts of that kind which must be left to administrative officers, and the ordinance is not invalid because the chief of police must determine the question of fact whether a picture or series of pictures is immoral or obscene.

"But it is said that, conceding the power of the legislative body to authorize an administrative officer to determine the question, the ordinance fixes no standard by which it is to be determined. Manifestly it would be impossible to specify in an ordinance every picture or particular variety of picture which would be considered immoral or obscene, and no definition could be formulated which would afford a better standard than the words of the ordinance. It is doubtless true, as said by counsel, that there are people who differ upon the subject as to what is immoral or obscene. There are the shameless and unclean, to whom nothing is defilement and from whose point of view no picture would be considered immoral or obscene. Perhaps others could be found, with no laxity of morals, who pay homage to art and would not regard anything as indelicate or indecent which had artistic merit, and would look upon any person entertaining different sentiments as of inferior intelligence, without proper training on the subject and blinded with bigotry. Both classes are exceptional, and the average person of healthy and wholesome mind knows well enough what the words 'immoral' and 'obscene' mean and can intelligently apply the test to any picture presented to him. There is a great diversity of opinion as to what constitutes good moral character, but it is beyond question that an officer authorized to grant a license to keep a dram-shop may determine whether the applicant has a good moral character, and there has been no ground for complaint that the power has been wrongfully or oppressively exercised against applicants. It is presumed that the chief of police, or the mayor, in case of an appeal to him, will perform his duty with reasonable intelligence and in accordance with the generally accepted meaning of the words. If there should be an abuse of power on the part of either the chief of police

or the mayor, the ordinance does not prevent an application to a court to compel either officer to perform his duty and issue a permit for a picture which is not immoral or obscene.

"It is further argued that the ordinance deprives complainants of their property without due process of law. Defendant has a right to prohibit the exhibition of immoral or obscene pictures, and the complainants would not be deprived of any right if they are prevented from exhibiting pictures of that class. If the ordinance is enforced according to its terms they will not be deprived of any property or right or the use of any property which they have a legal right to use. The only thing alleged in the bill having any relation to the question is the fact that the complainants will have to pay rent for the films or pictures during the time necessary for inspection by the chief of police. There would be no greater delay than is necessary in any case where a permit must be obtained for any purpose, and if the defendant may require the permit there is no lack of due process of law. The ordinance being general in its terms, and applying to all persons engaged in the moving-picture business, the complainants are not subject any unlawful burden.

"There is a further argument that some sort of a hearing is required in court to determine the fact whether a picture proposed to be exhibited, or one that has been exhibited, is immoral or obscene. We know of no decision sustaining such a doctrine and counsel do not appear to have found any. As we have already seen, there is no lawful objection to the determination of the question by the chief of police.

"There is a general averment in the bill that the complainants are engaged in exhibiting moving pictures which are not immoral or obscene, but there is no averment that the pictures specifically mentioned, which are the 'James Boys' and the 'Night Riders,' or the others for which permits were refused, were not immoral or obscene. It is true that pictures representing the career of the 'James Boys' illustrate experiences connected with the history of the country, but it does not follow that they are not immoral. Pictures which attempt to exhibit that career necessarily portray exhibitions of crime, and pictures of the 'Night Riders' can represent nothing but malicious mischief, arson and murder. They are both immoral and their exhibition would necessarily be attended with evil ef-

fects upon youthful spectators. If the other pictures for which permits were refused were of similar character the chief of police is to be commended for the refusal.

"No wrong was done or threatened to the complainants and the bill stated no ground for equitable interference. The court did right in sustaining the demurrer and dismissing the bill.

"The decree is affirmed."

In the case of Plumley v. Mass., 155 U. S. 461, the question of the validity of the act of that state in making it unlawful to sell oleomargarine colored to imitate butter was before the court in a habeas corpus case where the conviction was for selling oleomargarine that had been brought into the state from another state, and sold by the agent of the shipper in the *original package*. The law was claimed to be in conflict with the commerce clause of the federal constitution. The court says, on page 468:

"Can it be that the constitution of the United States secures to any one the privilege of manufacturing and selling an article of goods in such a manner as to induce the mass of the people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale."

The law was held valid, and the conviction properly had. The court, on page 473, distinguished the case from that of Leisy v. Hardin, 135 U. S. 100, where it was held that a state could not pass a law prohibiting the sale of liquor in original packages brought in from another state; the distinction made by the court being that the liquors in question there were lawful subjects of commerce, and that the law, so far as it interfered with the sale in original packages, placed a restraint upon interstate commerce, whereas in the case of oleomargarine colored to imitate butter, the law of Massachusetts operated simply to protect the people of that state from imposition and fraud, and where the goods were put out in such a way as to work fraud and imposition, they were not a lawful subject of commerce, or, at least, could be declared unlawful by a state law.

In the case at bar the censor law was passed to protect the people of Kansas from the harmful influence that might result from the showing of improper pictures in moving picture theaters. Certainly the harm that the statute in question was designed to protect against is of more serious nature than the fraud that the oleomargarine act was intended to prevent in the Massachusetts case.

Our public school system has been guarded at every portal to keep books that tend to corrupt morals out of the schools of the state. The picture show of to-day, produced by films or reels, subjected to inspection by the act in question, is probably the next in influence in molding the minds of the children of the state for good or evil. The school books are subjected to a rigid inspection by a commission appointed for that purpose before they are permitted to go into the hands of the school children of the state. And upon the same fundamental principle the films or reels used by the picture show should be inspected before they are permitted to be exhibited.

This is the view taken by the authorities of the city of Chicago, as expressed in the ordinance approved by the supreme court of Illinois in the above opinion. The legislature of Kansas viewed the matter in the same light and enacted the law in question. Such inspection is proper, and the will of Kansas thus expressed should be upheld by this court.

The State Superintendent of Public Instruction is the proper official to have charge of the inspection of the picture films to be used for public exhibition purposes in the state. He is constantly in touch with all the institutions of learning, and, more than any other official of the state, has an opportunity to know what is for the best interests of the school children in the state, and every influence that would be likely to produce injurious results to them from a moral standpoint.

The Governor, Attorney-general and Secretary of State constitute the Board to which any grievance

ast the acts of the Superintendent of Public In-
stion may be carried for review.

nay be said that this act confers judicial power u
ministerial officers; but not so. In Meffert v. M
l Board, *supra* (66 Kan. 710-715), the court said:

e board of medical registration and examination is
a judicial tribunal. While it may be said to act q
judicially, it is only a ministerial board and per-
fo no judicial functions. It is classed with such bo
as the county boards of equalization, boards for th
amination of applicants for teachers' certificates, c
ouncils in granting and refusing a business or o
tion license, and numerous other boards of simi-
la aracter. Such boards perform no judicial func-
ti are not judicial tribunals, and have never been cl
l as such. (State v. State Board of Medical Ex-
ar rs, 34 Minn. 387, 26 N. W. 123; Wilkins v. The S
113 Ind. 514, 16 N. E. 192; The State, ex rel. B
ughs, v. Webster et al., 150 id. 607, 50 N. E. 750, 4
R. A. 212; State v. Hathaway, 115 Mo. 34, 21 S. W
1; State Board of Health v. Roy, 22 R. E. 538, 48
802.)"

affirmed in Meffert v. Pacher, etc., 195 U. S. 625.

V.

*t the act in question is a revenue measure for th
neral fund of the state and is therefore a tax o
rstate commerce in violation of section 8, art. 1 o
Constitution of the United States.*

er this head appellant contends that the act in q
n violates the commerce clause of the federal c
ution, because picture films or reels are not p
subjects for inspection fees. And it sets up in
bill of complaint (rec. 2) that it "is engaged in
l and interstate commerce, in the renting, leas-
ir d in the sale and delivery of what are called 'f
in the state of Kansas," which films heretofore w
nd now are being used in the motion picture show b
ss of the state of Kansas.

The testimony of Mr. Lew. S. Nathan, as introduced at the hearing, is as follows (rec. 2):

"That he is the owner of two moving picture theaters, located in the city of Topeka, county of Shawnee, state of Kansas; that he *rents* films from the *Mutual Film Corporation* to be exhibited in his said theaters in Topeka, Kansas; . . . That deponent *pays as rental for the films* for each theater owned by him, the sum of forty-five dollars per week."

The testimony of Mr. Patrick J. Hall, introduced at the hearing, is as follows (rec. 45):

"I am the local manager of the *Mutual Film Corporation* of Missouri, the complainant above named. I have been engaged in the film exchange business for seven years and a half, and I am familiar generally with the motion picture business. The motion picture business is conducted in three branches, viz., manufacturing, distributing and exhibiting. The manufacturers simply pose and photograph the moving pictures and make positive prints from the negatives and sell them to motion picture film exchanges. . . . The motion picture exhibitor rents films from the film exchange. The reasons why the motion picture exhibitor can not and does not purchase films are that a reel of film on the average measures one thousand feet in length, and on the average costs $100. The public attending motion picture theaters demand that at each performance more that one picture be exhibited. . . . The public further demands a change of program at each theater, and such changes are made daily at some theaters, semi-weekly in others, and three times a week in others. The cost of procuring films for a theater, were it necessary for the proprietor thereof to purchase the same, would be so great as to prevent the operation of any theater, however popular and however large the seating capacity, at a profit. For that reason, almost coincident with the inception of the motion picture business, film exchanges came into existence. These film exchanges purchase a large variety of films from the various manufacturers at a very great expense, and distribute the same at graded rentals among the exhibitors. . . . The Mutual Film Corporation of Missouri conducts its film renting business in various parts of the states of Missouri, Arkansas and Kansas."

By appellant's bill and testimony it is shown that the picture films or reels handled by it are celluloid films about one thousand feet long, upon which photographs are taken. That "with the aid of electrical apparatus and mechanical appliances" said photographs are rapidly displayed on screens or curtains, thus "showing nature, life and human conduct."

We think that in the light of the allegations contained in appellant's bill and the evidence, appellant has misjudged this case so far as this point is concerned. Granting, for the sake of argument, that all the films that appellant may rent or sell in the state of Kansas are brought in from other states, nevertheless the law does not act upon such at any time when they are the subject of interstate commerce. It does not prevent the renting or sale thereof in any way, or their transportation into or within the state. It does, though, regulate their use, and use commences after commerce ceases. The situation is just the reverse of that presented in the case of United States v. Knight, 156 U. S. 1, 14, where it was held that the United States could not, under the antitrust law, prosecute, because of restraint of commerce, for the buying up of various refineries by the American Sugar Company and then shutting such purchase plant down, for the reason that all such acts pertained to the manufacture of sugar before it entered into commerce. The censorship act of the state of Kansas, after the films have passed their way through various channels of commerce, merely fixes conditions upon the use thereof after they have entered into and become part of the mass of property within the state.

Any such a shipment ceases to be interstate commerce when received with the intention of use in the state, or at least as soon as the shipping package is first opened, which necessarily takes place before such picture films or reels can be used for exhibition purposes.

In American Steel and Wire Co. v. Speed, 192 U. S. 500-521, Mr. Justice White said:

"As, however, they (the goods) had arrived in their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it is held that the tax did not amount to a regulation in the sense of the constitution, although its levy might remotely and indirectly affect interstate commerce."

May v. New Orleans, 178 U. S. 502.

Austin v. Tenn., 179 U. S. 351, 359.

If we should be wrong in our last two contentions, there nevertheless is abundant authority that the act complained of does not violate the commerce clause of the federal constitution. We cite the following, all being substantially in point on this and other claims made by appellant.

Patapsco Guano Co. v. N. Carolina, 171 U. S. 345.

Savage v. Jones, 225 U. S. 501.

Red "C" Oil Co. v. N. Carolina, 222 U. S. 380.

Standard &c. v. Wright, 225 U. S. 540.

Plumley v. Mass., 155 U. S. 461.

Austin v. Tenn., 179 U. S. 351.

McLean v. D. & R. G. Rd. Co., 203 U. S. 38.

The case of Patapsco Guano Co. v. N. Car., *supra*, is a leading case upon the question here raised and holding no violation of section 8 (commerce clause) of article 1 of the United States constitution. An act of that state provided for the inspection of all fertilizers sold therein by an inspector under the state department of agriculture, a fee was provided of twenty-five cents per ton, and it was further provided that a failure to comply with the act would be a misdemeanor. The salary of the inspector was to be paid out of the funds of the state department of agriculture, and all license fees were provided to be paid to the state treasurer and kept by him as a fund for the exclusive benefit of the state department of agriculture. On page 350 the court finds that it has been determined that the levying of inspection fee, even if excessive, does not violate section

10 of article 1 of the United States constitution, because that provision only applies to imports and exports from and to foreign countries, and then says on page 351 that where such a claim might properly be made under such provision or under the commerce clause, that it is probably a question for congress to investigate rather than the courts. However, waiving that view, the court says, page 354:

"But treating the question whether the charge of 25 cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question . . . We can not conclude that the charge is so seriously in excess of what is necessary for the objects designed to be affected as to justify the imputation of bad faith and change the character of the act."

VI.

That the act in question is in contravention of section 1 of the fourteenth amendment to the constitution of the United States in that it deprives appellant of its property without due process of law by imposing a fee of two dollars per film or reel inspected under the provisions of said act.

We do not deem it necessary to more than call the court's attention to a few of the leading cases, both of the state and federal courts, upon this proposition.

In Meffert v. Medical Board, *supra*, the court said upon this proposition:

"The argument is that to deprive a physician of his right to practice medicine otherwise than by a judgment of forfeiture by a judicial tribunal is without due process of law, and is in violation of the fourteenth amendment to the constitution of the United States, which declares: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law.' This constitutional provision is not a restriction or limitation on the police power of the state to pass and enforce such laws as in its judgment will inure to the health, morals or general welfare of its people. Such power is reserved to the state, which has been so recognized by all courts since the adoption of this

amendment. In People v. King, 110 N. Y. 418, 423, 18 N. E. 245, 246, 1 L. R. A. 293, 6 Am. St. Rep. 389, it was said:

" 'But, as the language of the constitutional prohibition implies, life, liberty and property may be justly affected by law, and the statutes abound in examples of legislation limiting or regulating the use of private property, restraining freedom of personal action or controlling individual conduct, which, by common consent, do not transcend the limitations of the constitution. This legislation is under what, for lack of a better name, is called the police power of the state, a power incapable of exact definition, but the existence of which is essential to every well-ordered government. By means of this power the legislature exercises a supervision over matters involving the common weal and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community, and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion with which the courts can not interfere.' " (66 Kan. 718-719.)

In Cincinnati v. Steinkamp, 54 O. S. 284, a law regulating fire escapes on buildings and for inspection, etc., was up for consideration. On pages 289 and 290 and 291, the court says:

"It is urged that the sections cited undertake to confer upon a court of equity, without the intervention of a jury, the power to take away from the owner by an order of injunction, the right to the use and enjoyment of real estate, and thereby deprive the party of his constitutional right of trial by jury, and of his remedy by due course of law.

"The proposition can not be maintained. It is not the purpose or effect of the act to take property, *nor to deprive the owner of the lawful use of property, but simply to require him to use it in a lawful manner.* The owner is not prevented from selling it, mortgaging it, devising it, or giving it away; nor does the act impose any lien on property. The statute simply operates upon it as it does upon all other like property coming within its terms. *Our constitution, and the practice of the courts, have always recognized the fact that in*

many cases no right of trial by jury exists. If the civil authorities were obliged to wait the slow process of a jury trial in such matters the evil sought to be remedied would seldom be avoided. The power to be exercised by the inspector is administrative rather than judicial in its character. *A jury has not been the ordinary tribunal to determine the exercise of such power. Hence, no right of trial by jury is violated in the present case.* (In Wood v. The State, 42 Ohio St. 186, Met. Board of Health v. Heister, 37 N. Y. 661.)

"The enactment is but the exercise of the police power of the state, that power which is characterized by Mr. Justice Gray, in Leisy v. Hardin, 135 U. S. 127, as 'that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the state against disorder, disease, poverty and crime,' and necessarily extends 'to the protection, health, comfort and quiet of all persons and all property within the state.' *It no more denies to the owner the use of his property* than do those acts known as building laws, which forbid the erection of frame structures within prescribed limits, or define the thickness, and strength of walls, bearers, girders, etc., *or direct the demolition of structures falling to decay, or otherwise endangering the lives of passers-by, which acts, so far as they are reasonable in their character,* and adapted to accomplish the purpose for which they are designed, are uniformly held to be within the constitutional authority of the general assembly in its just exercise of the police power of the state. (*Ex parte* White, 67 Cal. 102; St. Paul v. Dow, 37 Minn. 20; Hennessy v. St. Paul, 37 Fed. Rep. 565; Hubbard v. Paterson, 45 N. J. (L.) 310; People v. D'Oench, 111 N. Y. 359; Phila. v. Coulston, 12 Phila. 182; Fire Dep. v. Wendell, 13 Daly, 427; P. & W.'s Public Health and Safety, sections 326, 341; Fire Dep. v. Chapman, 10 Daly, 377; Grant v. Slater Mill & Power Co., 14 R. I. 380; Lawton v. Steele, 152 U. S. 133.)

"Nor is the act open to the criticism that it violates that provision of section 1, of artcle 4, of the constitution of the United States, which declares . . . 'nor shall any state deprve any person of life, liberty, or property without due process of law,' *for the settled doctrine is that this section does not abridge the exercise of the police power of the states, nor limit the subjects upon which they may legislate.* (The State v. Moore, 104 N. C. 714; Woodruff v. Railroad Co., 59

Conn. 63; *In re* Rahrer, 140 U. S. 546; P. & W. Public Health and Safety, section 15, and authorities cited; Lawton v. Steele, *supra.*)

"But were it otherwise, still the criticism could not avail, *for it is due process of law if it be 'law in its regular course of administration through courts of justice;* law which proceeds upon due notice and inquiry, which hears before it condemns, and renders judgment only after trial.' All these requirements are amply provided for in the sections of the act which have been recited." (State v. Cramer, 85 O. S. 349, 390.)

In Mugler v. Kansas, 123 U. S. 623, 665, 666, the court said:

" 'The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.'

"The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

" 'By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily entrench upon any authority which has been confided, expressly or by implication, to the national government.' "

VII.

That the act in question is in violation of section 1 of the fourteenth amendment to the constitution of the United States in that it abridges the privileges or immunities of citizens of the United States in the matter of free speech and free press, and section 11 of the bill of rights of the constitution of Kansas.

It is urged by appellant under this assignment of error that the act in question is in violation of section 1 of the fourteenth amendment to the constitution of the United States and section 11 of the bill of rights of the constitution of the state of Kansas which guarantees the right of free speech and free press.

Section 11 of the bill of rights of the state of Kansas is as follows:

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

Certainly the rights of appellant under the 14th amendment are not abridged because of any restraint upon its liberty of free speech under any claim that it is a "privilege or immunity" (granting for the moment a corporation has such), because such privilege would not pertain to it as a citizen of the United States, and it is only the privilege of United States citizenship that is protected under this clause, and not rights held as the citizen of a state.

Bartmeyer v. Iowa, 85 U. S. 133.

Mahon v Justice, 127 U. S. 700.

Rosenthal v. New York, 226 U. S. 260.

The due process clause of the fourteenth amendment of the federal constitution, which is the only other guarantee of the amendment that could be claimed to be infringed, does not apply, if there is any power at

all in a state to protect its citizens under the police power. It has been repeatedly held as shown *supra* that all of the rights of citizens protected by the bill of rights, provisions of the federal and state constitution are subject to the provisions of laws passed for the general welfare under the police power. We cite, however:

Gundling v. Chicago, 177 U. S. 183.
Adams v. Milwaukee, 328 U. S. 572.
Murphey v. California, 225 U. S. 623.
New York v. Carr, 199 U. S. 557.

The freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation.

Robertson v. Baldwin, 165 U. S. 275, 281.
In re Rapier, 143 U. S. 132.
In re Horner, 143 U. S. 570.

The court will notice that even though the guarantee to the individual citizen of the right to "freely speak, write and publish his sentiments on all subjects" is clear, it is not more than the rest of the constitutional guarantees set forth in the bill of rights. All of these constitutional guarantees are subject to laws passed by the legislature under the police power.

In re Banks, Petitioner, 56 Kan. 242, was an action seeking to have chapter 161, Laws of 1891 of Kansas, declared unconstitutional because it was in contravention of section 11 of the bill of rights of Kansas. The court said:

"'The freedom of the press shall be inviolate: and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted.'

"The act under consideration was not passed to prevent the publication of libels, nor to suppress papers indulging in such publications, but to prevent the publi-

cation and sale of newspapers especially devoted to the publication of scandals and accounts of lecherous and immoral conduct. Without doubt a newspaper, the most prominent feature of which is items detailing the immoral conduct of individuals, spreading out to public view an unsavory mass of corruption and moral degradation, is calculated to taint the social atmosphere, and, by describing in detail the means resorted to by immoral persons to gratify their propensities, tends especially to corrupt the morals of the young, and lead them into vicious paths and immoral acts. We entertain no doubt that the legislature has power to suppress this class of publications, without in any manner violating the constitutional liberties of the press."

We think that both the federal courts as well as the Kansas courts hold against the views of the appellant as expressed in its third assignment of error.

The censor law in question is not one that has for its purpose any regulation of "speech" or "press." It merely regulates "picture films to be publicly exhibited." It does not regulate any other kind of a film than a picture film, and if there was any real constitutional infirmity to be avoided, this court could construe the act to limit the censorship to films showing pictures, as distinguished from printed matter.

Appellant further contends that the act in question violates the privileges and immunities of itself and other citizens of the United States "by placing an embargo and prohibition on the rights of the complainant and citizens of other states in the transaction of lawful business.

Certainly appellant is not in a position to set up the claim of unconstitutionality, unless the unconstitutional operation of the act affects appellant; because some one else might make such a claim does not permit appellant to make such contention here.

Taylor v. Judges, 179 U. S. 410.

Castillo v. New Orleans, etc., 142 U. S. 88.

It is well settled that the appellant, being a corporation, has no privileges and immunities that it can

claim protection for under this particular provision of the federal constitution.

Selover, Bates & Co. v. Walsh, 226 U. S. 112.

Ordent Ins. Co. v. Daggs, 172 U. S. 561.

It cannot be disputed so far as this clause is concerned that the act is simply intended to regulate a business that properly falls within the class that may be regulated under the police power. We cannot think that further argument or authorities are needed to support this contention. It is also apparent that there is no "embargo and prohibition," but a mere regulation of the rights of complainant. It is apparent that on this ground no unconstitutionality appears.

VIII.

That the expense for approval of films would be $39,000 for the first three months, and $25,000 for the remainder of the year; that the total expense to the state would not exceed $6000 for the first year, and not more than $3000 per annum thereafter.

We are wholly unable to find out where appellant procured the data upon which to base any such claims, and we are therefore persuaded that they are based upon mere speculation. The affidavit of Patrick J. Hall was introduced at the hearing, and we here give the substance of his testimony upon that proposition.

He says (rec. 29) that appellant has about fifty customers in Kansas, and that the expense of approval of films or reels would be between $3500 and $4000 for the first three months, and about $2500 for the balance of the year, making the total expense $6000 for the first year, and about $3000 annual cost to appellant for subsequent years. This estimate includes a carrying charge of one dollar per film or reel, and it is urged from this estimate that the charges for inspection would so greatly exceed the cost of inspection as to make the bill a large revenue producer for the state of Kansas.

A few of the expense items that can now be mentioned are as follows: the expense of equipment, examination, traveling, assistants, expenses of running office, license tags or stamps, and the prosecutions to enforce the act have not been taken in to account so far as the allegations of the appellant indicate. Also, the expense to the state of defending this law-suit might very properly be considered as one of the necessary expenses. It seems to be necessary for every such law to run the gauntlet before it is finally accepted by the public.

As we have hereinbefore asserted the act in question is not in contravention of section 10, article 1 of the constitution of the United States; but granting for the moment that the fees proposed by the bill are a tax upon commerce, nevertheless the appellant exhibits only a case where the films of the appellant are imported into the state from other states of the United States, and not from foreign countries. It has been repeatedly held that said provision of the federal constitution applies only to imports from foreign countries. Cases *supra* and—

McLean v. D. & R. R. R. Co., 203 U. S. 38.

Woodruff v. Parham, *supra* (75 U. S. 123).

Then further there is nothing to indicate that if there is a "net produce of all duties and imposts" provided for by the act, that will not be paid by the state of Kansas into the United States treasury. If the fees provided for by the act can in any way be held to be an impost or duty levied upon foreign imports, the constitutional provision in question is self-executing. And as was set forth in paragraph 27 of appellees answer (rec. 20), "if there shall be any balance of such inspection fees authorized by this act left over in the state treasury of the state of Kansas, after all expenses of administrative inspection are paid, the state of Kansas will be ready to respond to the national government for any accounting thereon which may be lawfully due

the treasury of the United States under this act and the constitution of the United States."

We think we are right in contending that the law does not operate on any films while a subject of interstate commerce, and even if it did there is no showing made that takes the case out of the principle of the above cases. So far as the constitution of Kansas is concerned, the law would be valid either as a tax or license law.

Gundling v. Chicago, 177 U. S. 189.

Woodruff v. Parham, *supra* (75 U. S. 123).

And that after all expenses incidental to the inspection provided for by the act in question are paid out of the proceeds received for such inspection, there will be nothing left to go into the treasury of the state of Kansas as a revenue to the state from such inspection.

IX.

That the films or reels contained nothing immoral, sacrilegious, or impure.

Appellant asserts that none of the motion-picture films rented, leased, sold, or delivered by it depict anything of an immoral or harmful character. This shows that the only inconvenience that will be caused appellant in conducting its business under the provisions of the Kansas censor law is the incidental expense and inconvenience of producing its films for inspection. The universally accepted presumption that public officers do their duty would prohibit the condemnation of appellant's films or reels if the allegations of the appellant in this respect are true.

Appellant introduced evidence of the character of its picture films or reels (rec. 24), and shows thereby that many of the leading novels of the world are dramatized and thus exhibited to the public through the medium of picture films or reels, and we grant that if nothing but the class of films or reels mentioned in that list were exhibited to the public no censor or in-

spection would ever be necessary, but it is just as possible to produce a class of films or reels that are as disreputable and injurious to the public as those above narrated would be instructive and elevating. It would be possible to run a film dramatizing Pilgrim's Progress, by Bunyan, and the next film shown be the Jeffries-Johnson prize fight. The next film shown might be the Star of Bethlehem, and the next film to follow show a Mexican bull fight, with all its attending evils. It is not the instructive or elevating pictures the law is intended to exclude from exhibition, but it is the injurious and degrading ones that the law seeks to eliminate from the state of Kansas, and if the principle contended for by appellant should be upheld there would be nothing in the way of flooding Kansas with picture films or reels of the most injurious and degrading type that are lying in wait for the law that puts them on the shelf to be declared unconstitutional by this honorable court.

The picture films or reels handled by appellant may be all that is contended for them. The act in question does not single out any person, firm or corporation in its application. It provides that it shall be unlawful for any person, firm or corporation to exhibit or use any moving picture films or reels unless said films or reels have been examined and approved, etc., provided that nothing in the act shall apply to films or reels used exclusively in institutions of learning in Kansas. The act in question is applicable alike to all persons, firms or corporatons using picture films or reels in the conduct of places of amusement, and, in the judgment of the legislature of the state of Kansas, was for the best interests of the public morals of the state.

The case of Western Turf Association v. Greenberg (204 U. S. 359) involved a similar statute of the state of California. Mr. Justice Harlan, delivering the opinion of the court, said (p. 363):

"This court can only pass upon the validity of the statute with reference to the constitution of the United States. We perceive no reason for holding it to be

invalid under that instrument. The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations, or associations conducting places of public amusement or entertainment. Of still less merit is the suggestion that the statute abridges the rights and privileges of citizens; for a corporation can not be deemed a citizen within the meaning of the clause of the constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the laws of a state.

"The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law; for the liberty guaranteed by the 14th amendment against deprivation without due process of law is the liberty of natural, not artificial, persons. Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, ante, 168, 27 Sup. Ct. Rep. 126.) Does the statute deprive the defendant of any property right without due process of law? We answer this question in the negative. Decisions of this court, familiar to all, and which need not be cited, recognize the possession, by each state, of powers never surrendered to the general government, which powers the state, except as restrained by its own constitution or the constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well-being, comfort and good order of the people. The enactments of a state, when exerting its power for such purposes, must be respected by this court, if they do not violate rights granted or secured by the supreme law of the land."

There are 520,000 school children in Kansas, and the state expends many millions of dollars each year for the proper education of them and to nurture them into proper, wholesome and moral citizenship. Out of the general reveune fund of the state, by direct appropriation, over two millions of dollars are expended per annum in behalf of such education, besides untold millions which are contributed by the various counties, cities and other subdivisions of the state, in behalf of education and moral training in citizenship.

And in addition thereto large and indefinite amounts are expended by private, religious and moral associations and organizations, all seeking the same general end—education and moral training for the young citizenship of the state of Kansas. And the legislature, in its unimpeachable wisdom, believed that uncensored pictures were detrimental to the morals and perversive of true education.

In the light of the decisions of the several courts hereinbefore referred to we maintain that the act in question is not in violation of the constitution of the United States or the amendments thereto, nor of the constitution of the state of Kansas; that under the police powers of the state picture films or reels are proper subjects of censor or inspection; that the matter of inspection may be delegated to any person or body designated by the legislature; and that the fee fixed by the legislature in said act is a reasonable charge for such inspection and certificate.

We submit that the judgment of the district court, dismissing appellant's bill of complaint, should be affirmed.

Respectively submitted.

John S. Dawson,

Attorney-general,
Solicitor for Appellees.

Frank P. Lindsay

Of Counsel.

□